GLOBALIZING JUSTICE

deficiencies in the quest and discontents of world development

Ahmed Jehani | Kishor Uprety

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To
those who calibrate and cerebrate justice
and
to those who suffer by refusing to suffer injustice
so that
everyone can celebrate justice

CONTENTS

FORENOTE

Revitalizing the Spirit of San Francisco

Millions of minds lay astir on a day of May in 1945 with the hope of a new world being reborn with a fresh vision. After two devastating world wars, delegates from 46 countries had gathered in the city of San Francisco to bid farewell to arms. The hope was that the virus of war could be abolished from people's minds as a way to resolve conflicts and the vision was to herald a new era for humankind with prospects of development and justice for people everywhere – the rich and the poor, the strong and the weak, the great and the small. A brass plate in Hotel Fairmont epitomizes the spirit of San Francisco embodied in the UN Charter of 4th May.

Six decades have passed by, decades in the course of which the world is claimed to be drawing together as a village and transiting from Hobbesian anarchy toward Kant's cooperative peace. But the hopes that people had put on that global covenant on peace remain unfulfilled and the dream of a just and prosperous world lies unredeemed. Instead, the virus of conflict has metastasized onto primeval instincts to spawn crisis in myriad forms leaving international law in limbo. From Kashmir to Congo, the chronology of world politics is littered with chronic conflicts and catastrophic wars. With international law becoming more confusing and coercive rather than inclusive and accommodative, the spirit of San Francisco is on the wane. The Veto in the UN, Washington's refusal to the Kyoto Protocol, and reservations over the International Court of Crimes announce the failure of nations to collaborate.

People's preoccupation with justice is probably as old as humanity itself. International law (*Jus Gentium*) evolved as a grammar of global statecraft – from the sharing of legal norms between nations and conventions between states – to ensure minimum justice and the rule of law and minimize, if not abolish altogether, brutality among nation-states. But the inability to read the runes, failure in forging regional bonds and sharing global concerns, and ineptitude in implementing the rules of the game are hindering progress, often yielding just the opposite of what was intended – hostility and hatred in place of harmony and hope.

Probing the causes, the conduct, even the consequences of injustice is far from simple and the answers to the queries are neither easy to seek nor quick in their solution. Handling justice in its Balkanized state is therefore going to be more and more tricky in the days to come and more demanding. This one can say for more than one reason. The first one, of course, is what John Naisbitt calls **Global Paradox**: *The bigger the world economy, the more powerful its smallest players*. The second one is the increasingly weasel-like nature of justice itself. Justice, instead of remaining largely corrective and commutative as it once was, is becoming more holistic, demanding to be more retributive and distributive, facilitated by the global transition of paradigms on multiple fronts – from human rights and security to democracy and development which induces a new set of risks, roles, and relationships in the way justice is going to be defined and implemented in the future. Achieving progress in a situation where states with authoritarian tendencies rule in the midst of partisan, feudal civil societies, too, is not going to make it easy. Nor is the situation helped by the absence of an empirical measure (such as an Equity Index) to compare progress (like HDI, GEM or Health Quotient that Dr. John Hart talks about) as a barometer of the conflict potential of societies, countries, and whole regions. Still another reason is a certain moral culpability: the unwillingness to part with hypocrisy when appraising the issue that can jeopardize justice. Justice, for instance, is at stake when the rat race to produce more for less and sell for more imperils human lives. Justice is at stake when aid largesse begins to mute the voices on justice. Justice is at stake when most of the industrialized North cares least for Climate Justice, one uncomfortable truth emerging during the first phase of the Copenhagen Summit. Justice is at stake again when the short-term benefits of the individual states begin to dominate the long-term well-being of the world at large.

Against all this perspective, *Globalizing Justice* takes up an agenda that has been repeatedly raised or pledged in countless discussions and fora only to be neglected, forgotten, or abandoned. The literature in this regard abounds on the views from the first and the third world. What is rare is an approach that synthesizes both, correlating legal structure with development. This is what the authors do in the present volume, taking the reader on a *tour de horizon* to revitalize the agenda and in that course also challenging some of the principles, practices, and propensities at work in international law.

There is no obvious alternative to globalization as a world process today just as there is no alternative to justice as a universal, perennial value. The two elements, one as a process and medium, and the other as a value and goal, the authors juxtapose in the title of the volume. If justice is thus the central motif animating the spirit of their discourse, globalism is the path and the parameter that sets the boundaries, the message being that in the process of getting globalized, globalization of justice has hardly got anywhere and justice has woefully failed those who need it most – the deprived and dominated humanity – turning it into a game of middling and meddling that can yet be turned into a mission, given the right kind of will and vision.

Globalization, in fact, is a multifold process with at least four components of elemental significance for human development: democracy (political right), privacy (civil security), liberalism (cultural identity), and market (economic value) with justice denominatoring all components. Antedating and probably anticipating the constructivist revolution, Tocqueville's Law put it aptly: What the few have today, others will demand tomorrow. In other words, justice is like Rome: all roads lead to justice.

While justice is thus a universal aspiration, international law is not everyone's cup of tea. Yet, considering the gestalt that the title of this volume suggests, the urgency of the long-delayed discourse on which the two authors join forces to dig out its key deficiencies, and the direness of their consequences for global development, the

intricate relationship between the deficiencies and development emerges as a paramount factor to become everyone's concern. At the end of reading the book, one common thread becomes visible, that of justice, binding us all together in a common destiny from which there is no escape. But, beneath the surface one can also notice a storm brewing.

Since international law in its conventional form is often arbitrary, even ambiguous, access to it for the predominant majority of humankind is unequal and unjust. St. Aquinas regarded every unjust law as "a species of violence", and because injustice is at the root of most of the human conflicts, the idea of a global rule of law via the conventional mode of international law becomes untenable because it is wildly inappropriate to many of the challenges emerging. To illustrate, the existing patenting system of global trading rules prevents the production of generic drugs on a mass scale as a part of the global protection racket in order to serve the interest of drug companies rather than the health of humanity. This may explain why Jonas Salk refused to patent the polio vaccine. International law has become, to borrow a phrase from Solon, like a spider's web, which snares small things, but lets the large ones break through and escape.

If after four centuries of evolution, progress in the field has been slow and skimpy, the forces of resistance constitute just one reason. Another is the series of "attempts to create a viable machinery of international justice," which, says Bernard E. Rollin, "... run the gamut from laughable to ineffectual." The course is particularly torturous for those who have to bear the burden in silence. For others, justice, when it comes, comes either too little or too late, the powerful exacting what they can and the weak granting what they must.

International law has survived, but hardly more than as an excuse for unbridled competition and as a ruse for the dominance of those who try to keep their writ running large. Overall, the journey has been tortuous and tempestuous and the costs far too

heavy. Judged by the sheer scale of opposition to the existing global law regime and in terms of the net effect of the negotiations attempted so far, global justice has been a damp squib. Change is there, but as one saying goes, the more things change, the more they remain the same. Also, with each protagonist reading a different meaning into the change, the conclusion is bound to be varied. As a Socratic dialogue puts it: if an ass looked into a mirror, he could not expect a sage to be looking out.

International history is also littered with blunders of epic proportions bred by the cult of intelligence and nurtured by the theologians of the realpolitik school, who rationalize the Latin saying *Inter arma silent leges* ("in the times of war the law is silent") to serve their agenda, and who rarely concede they hold the wrong end of the stick, their hackles rising whenever morality is raised as an issue. That intervention in the internal affairs of nations is a double-edged sword was brought home painfully by the tragedies in Kosovo and Kampuchea. But superstitions run so deep and egos remain so strong that owning up to the damage takes long in coming. It took admiral Zumwalt eighteen years to apologize for the 7th Fleet fiasco in the Bay of Bengal in 1972, Henry Kissinger strategic defeat in South East Asia to acknowledge in 1975 the weakness of his policy, Robert McNamara the Vietnam debacle to write out his confessions, and Eduard Shevardnadze a humiliating retreat and eleven years to admit that the Soviet intervention in Afghanistan was the most serious violation of civilian human values.

In this drama of failure, the ultimate crime, says Thomas Pogge, is the unwillingness of politicians to transform the unjust character of international regime and instil global pluralism. Preventing resource thefts, guaranteeing just use of the resources of space and oceans, ensuring equity in development, and safeguarding an undivided peace for the divided humankind demand a robust global coalition of efforts, unlikely to come as long as predatorial *etatism* prevails. This is so because statism has become a problem rather than the solution as far as human well-being is concerned, and instead of protecting human rights, it produces human wrongs on a global scale: a situation where politicians hold international law as their hostage.

In such a world of Darwinized law that separates its national and international variants by a thin veneer and where only the strong can thrive while the weak languish, national responsibility may be essential, but is not sufficient by itself to guide the course of global statecraft which must take into account international as well as humanitarian responsibility. But then the agenda becomes more political and global rather than strictly legal, local, or regional in a straitjacketed fashion.

There is, of course, no dearth of apologists for the old order. Defending the indefensible is a familiar game. When the rationale is missing, they will invent one. But those who have lived through the ordeal would find it difficult to forget. Memories keep rankling. Some of the sores are as old as Athens; others reach past Ayodhya. Quite a few of these discontents bear the capacity of not only dividing societies; they can also unite them to ignite rebellion. With embers of ancient tribal hatred still glowing and the flames of national hostilities smoldering, if globalization fails to conscientize the international regime, the unspoken corollary is the scope for another kind of globalization: of discontent transforming the deficiencies into a global disaster.

The lesson is simple: If global equity is to prevail, we need more than good intentions in documents and pledges from pious proclamations. We need institutions that can effectively countervail the propensity of states' naked reliance on *machtpolitik*.

Instead of proposing that judicial activism alone and by itself can cure the malady, a more complex mechanism has to be put in place to dynamize global socialization with international media, judiciary, civil society, private sector, and political parties joining hands to reconfigure the roles and relations in international governance and society. Legal activism of national and international civil society can complement adversary litigation and social activism and monitoring to keep vigil and countervail the role of the Iron Triangle. But since without interrogating the conventional value premises and features of the old order – most of which remain structurally

embedded – regional and national inequality, gender injustice, religious obscurantism, democratic deficit, elite opportunism and indulgence by external powers, grand corruption – the perspective on the subalterns is unlikely to change, the gap between judicial activism at the top and judicial anarchy at the bottom will keep yawning, and the global justice project would hardly make a headway.

The issue therefore is not whether international law should undergo a fundamental shift. Rather, it is whether a global sense of priorities ought to prevail in deciding on the paramount issues of the day. We must also ask the question whether the praetorian fears and biases should be allowed to contaminate and corrode decisions on the issues raised by the debate on the global agenda.

Quibbling will not help, nor will bickering. Neither the reparatory approach adapted at Versailles nor the revolutionary struggle waged by the class protagonists in the past century could globalize justice. But absolute amnesia, too, can be equally dangerous, posing the risk of repeating the wrong kind of history. This is why, in their effort to illuminate the predicament, the two authors mount a common front to identify the deficiencies rooted in flawed power equation and false balance of power that breeds decisional inequity to snub human dignity whose role, says Jurgen Habermas, is pivotal in democratic theory. The rationale behind their approach is that the agenda should be decided through open communication between citizens and closer connectivity between communities that would enable them to claim back the minimum control over the circumstances of their lives in order to restore civic dignity. The logic is that the issues should be defined through robust collaboration between states rather than under the warped Westphalian order of command and clandestine control. The leitmotif of the whole discourse, of course, is the shared nature of human life and prosperity on this planet and the shared nature of international law. But the task here – resolution of the crisis of justiceability and mediating realism and rationalism with revolutionism – is so stupendous, the tensions so acute, and the contradictions so sharp

and complex that, in their search for a just international order acceptable to all, the authors cannot help reaching back to the antecedents of justice and development in the holy traditions of the major ancient religions in their hope to distil cross-civilizational wisdom. They also try to draw on the insights of modern philosophers ranging from Gandhi to John Rawls in underscoring the need to restructure the discipline, which they feel demands institutionalization on a triple front with a five-point framework of change proffered at the end.

At a time when places located furthest on the world's map can come together at a mere click of the mouse, be it Boston, Banjul, or Beijing, the playing field of international law demands leveling *a la* Thomas L. Friedman. And, to become truly international, law must learn to break all the bounds and barriers, local, national, or regional, whenever politics gets in the way in the public domain, preventing people, in Paul Valery's terms, "from taking part in affairs which properly concern them". There may, of course, be little to choose between the callous indifference of those who are in a position to reform, but will not, and the impotent apathy of those who wish to, but cannot. Such an immobilisme, however, cannot be allowed to become the excuse to postpone the agenda. The choice the authors present here is far too delicate for that: it lies between the dilemma of desperate poverty and despoliation brought about by unashamed greed and unshared growth, which unless stalled in time, could ultimately set the stage for the shared death of us all. Reappraising the ends and means of development within a framework of individual rights, national responsibility, and global justice, the authors conclude that the deficiencies in international law render the solution universal.

Improving on the deficiencies may not make international law perfect, but it can soothe the raw nerves and heal some of the sores that lie festering. The greater danger lies in giving up on the project altogether. Disdaining globalization is tantamount to condemning globalism itself and neglecting globalization can prove worse than the perversion of the process. Perversion, with all its sordid

consequences and with all the failures of countless negotiations, can be rectified in time. Remedying neglect is a more difficult and complex task. Rescuing global justice, however, from the current quagmire will be doomed, if it does not go through the larger political process.

For that to happen, two conditions become critical. The first one is to develop institutions that can countervail the strength of the State when it becomes morally binding to stand against it, which means norms and traditions that do not subject the individual to the dictat of the community. Recall that one of the most bizarre violations, if not indeed the first one, in human history of the principle of individual freedom, human rights, and hence justice, occurred in the fourth century BC in Athens, the cradle of democracy, when the greatest philosopher of the age was given hemlock by the *democratic vote* of the *Popular Assembly*. Even today *Honor Killings* continue in certain societies under the garb of justice. The second condition is that the regime, whether local or global, must apply the rule equally for everyone, whether rich or poor, strong or weak, large or small. Otherwise, justice can become a matter of joke, depending on the whims of the powerful and globalization little more than the popular song parody of the tramp in a Hindi movie in the 1950s. Recall, too, that Caligula had his horse appointed as a senator, and a certain Rana premier in Nepal commissioned a goat as his administrator.

Given the urgency that the crisis of global justiceability presents, whether this exercise influences the course of the debate on international law should be left for the future to tell, but, appearing in the middle of the second global recession to vindicate the central premise of this volume, it does stir up more than a sense of déjà vu. What matters now is what we do with the setbacks suffered so far on the agenda to redeem justice in every community, every country, and every continent. For, what else does the hymn *Sarve bhavantu sukhinah* ... celebrate, if not justice for everyone and everywhere? Indeed, if the world is to be really drawn together as a common village – better yet, as a global family, as the ancients in this part of the world proclaimed millennia ago (*Vasudhaiv Kutumbakam*) – justice must be recognized and

operationalized as the central force in any human project, local or global, worth striving for, and as the fundamental spirit propelling and steering all missions of social transformation. "If a society cannot help the many who are poor," said John F. Kennedy rightly, "it cannot save the few who are rich." However, the point is not just to save others or surviving oneself. The larger point is sustaining, even surpassing what humanity has achieved so far. That would be the challenge tomorrow, for, as John Naisbitt prophesies, "The opportunities for all of us as individuals are going to be far greater than at any time before in human history." That is why, as a global crusade, no human project can vie with the globalization of justice in the days to come in its import, and, as far as justice is concerned, there is no third choice, locally and globally, between doing very little and doing something substantial.

It is in that sense that *Globalizing Justice* becomes more than the professional's cup of tea: a common bowl, which everyone can share. Could there be a better way to renurture or revitalize the spirit of San Francisco?

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PREFACE

The course of legal history so far prompts three observations of critical import. One, when the national or international legal structure is irrational, contradictory, or dysfunctional, both human existence and aspirations are likely to be imperiled. Two, unless the contemporary societies in the developing world reject the traditional models of development to restructure their basic institutions along principles compatible with the system of the developed world, they will find themselves increasingly vulnerable to becoming the victims of an uncontrollable force of destruction. Three, averting such destruction demands harmonizing the policy, laws, and institutions of the developing countries with those of the 'developed world.'

While the transfer of legal system from one society to another has been frequently attempted, the evidence of its real success is absent. The absence is due to the fact that laws and societies are diversified, and not every country can equally and equitously benefit from such change. Also, international law often fails to guarantee justice, confusing the discourse on development, primarily led by a small, powerful group of elite countries. As such, the reality of any conception of equity in international law is denied by the environment within which the current international legal order functions.

In the last half century, the extreme positioning of power and ideological politics of states over economic growth through market delayed serious discussion about the fundamental issues of rights and development. One unfortunate consequence was the failure to design and implement a rights-based development approach that could provide global justice. More than one reason can be offered to explain why serious structural reform is needed based on significant paradigm shift.

One, the continual assertion of national demands, disguised as international interests has led the international community to promulgate rules benefiting only a few selected countries and interest groups. Two, a number of entities have emerged on the global horizon, which in the past would not have been treated as formal subjects of international law, but are acquiring status and space, rendering the international legal regime more complex and more incoherent eroding its sustainability. Three, the current process of decision-making in international organizations and fora has failed to guarantee equal status to all countries, and is thus not only anti-equity but also anti-development, particularly because it can be safely presumed to benefit only powerful states and large corporations located in financial centers and capitals of the world. The situation ultimately brought up the demand for the New International Order (NIEO). But if the call for NIEO turned out to be a damp squib, one major, if not the only, reason was that it did not serve the interest of powerful interest groups in the industrialized world.

Actions throughout history have also confirmed that since all countries are fixated on protecting their own national interests, none is really interested in protecting global interests. The talks about global needs, however, have remained constant. As such, the global objectives for the international community as a whole should have been to minimize violence and maximize global welfare and global justice, ecological balance, and participation in authority processes, i.e., governmental decision-making. Establishing an authorizing environment at a global level on behalf of the less fortunate countries to achieve all this seemed warranted for the sustainability of the current international system. But, in the absence of concrete and monitorable mechanisms, the international law regime has been limited to the mere provision of 'lip service'.

In establishing an authorizing environment, a discipline has to be imposed on negotiators of all international agreements to seek not only efficiency but also equity and justice. Even the smallest of

states needs to be protected, lest it become a failed state, which further complicates the formation of a healthy, vibrant international society. Institutionalizing the norms, rules, and regulations in the course of inducing the transnational corporations to realize that the cost of doing business also includes the right to development as part of their efforts to 'glocalize' and help defray the hidden costs of a dysfunctional global legal, political, financial, and social environment needs to become part and parcel of all international decisions.

All contemporary economists agree that the global wealth is being distributed in an uneven manner. Still, instead of aiming for a better and more effective system, which could be achieved by completely changing the real distribution system and the thinking process associated with it, the international community has focused on growth alone and efforts continue to be put on increasing growth only, not on justice, and on globalization of markets, not on equitous global development.

There is certainly no dearth of scholars who emphasize that all fundamental rights and freedoms are necessarily linked to the right of existence, to higher living standard, and therefore to development. This study goes one step further: to 'development' based on rights. Extracted from the framework of the values, standards, and principles captured in the UN Charter, the Universal Declaration of Human Rights, and the constitutions and laws of many countries, the rights-based approach to development attempts to provide both a vision of development for a country and a nationally tailored set of tools to achieve it. It not only attempts to define the subjects of development, but also to translate people's needs into rights, recognizing the human persona as an active subject as well as a claim-holder. Adopting a rights-based approach not only engenders change in the elements and variables of development, but also in the traditional thinking process of designing the institutions for development. The rights-based approach could particularly help in

mediating the problem of levels (community, nation-state, and global) where it will not be out of context to observe that the European Court of Justice has ruled (in the case of Costa v ENEL) that community law has primacy over international law.

The current international system, therefore, demands reforms on two fronts. Initiative on the first front would make the national systems more democratic, more inclusive, and more participatory, improving the scope for consensus-building in decision-making. This would make it possible for people to resort more and more to justice and enjoy more rights in the society, and thereby an enhanced status of national development. Initiative on the second front demands substantially broader participation of stakeholders and attainment of full-fledged internationalism amongst the community of countries, including eventually the formation of an international government acceptable to all. It will also be in order to stress at this point that law exists both within and without society. But because law springs from social life, our vision of the ideal is limited by its institutional manifestations. While implementation may be facilitated by the union of law and society, innovation may be stifled. But law's response to the kaleidoscopic shifts of global and local social patterns is going to be far from easy, quick, or simple. That the European Union has yet to adopt a common social policy indicates how complicated and tortuous the challenge of uniformizing social policies can be. Given the delicate nature of the task, and given the fact that the process is going to be arduous and long, the new legal regime demands all the seriousness it deserves.

It is in such a context that this study attempts to clarify the correlation of legal structure and development from the perspective of jurists viewing international relations and the system peripheral thereto through the lens of developing countries. By analyzing briefly the legal structure (norms, processes, and institutions) of several human activities and endeavors (social, political, and economic), the study also draws conclusions in terms of the

correlation between the system of law (order and stability) and development (change, restructuring, and adjustment), probing the needs for substantive changes. The argument is based on but one sole premise, if there is a need for one: That ensuring international justice and guaranteeing the right to development through the current system is simply not possible.

AJ and KU
Washington, D.C.

PART 1

OVERVIEW

I

INTRODUCTION

It is apparent that human activities in the world that are governed by a framework of rational rules (legal structure), under which such activities may be conducted, give rise to conditions that fulfill the human interactional expectation and better satisfy the needs and fears of the respective individuals, groups of individuals, communities, and countries. Conversely, if the legal structure, national as well as international, is irrational, contradictory, or otherwise dysfunctional, human existence and aspirations are likely to be imperiled.

Neither the correlation between legal structure and human activities, nor their development, however, is absolute since a number of variables come into play as human activities unfold, and which argues against confining the inquiry to the legal structure (norms, processes, and institutions). Their correlation is neither instrumental nor consummatory, and neither independent nor dependent in variability but rather shows circular causality and interactional logicality.

Whilst the transfer of legal system from one society to another has been attempted, the evidence on its real success (the development of either society or law) is absent. Elsewhere, it was argued that failure was attributable to: (i) the failure of the receiving society to integrate the new rules into their human activities and/or endeavors; (ii) the general lack of social discipline and weakness of law enforcement; and (iii) the absence of a professional bureaucracy to implement and adapt the norms, processes, and institutions to changing circumstances. However, this rapid, yet premature, conclusion may not necessarily transpire from reality.[1]

This study proposes to refute these arguments with the aim to clarify the correlation of legal structure and development from the perspective of jurists from developing countries, and to analyze briefly the legal structure (norms, processes, and institutions) of several human activities and endeavors (social, political, and economic) to draw conclusions on the correlation between the system of law (order and stability) and development (change, restructuring, and adjustment). The study also attempts to show that it is not the sheer inefficiency of the receiving societies, as alluded to earlier, but the systemic deficiencies along with the ever-increasing complexities of the system of contemporary times that are the causes of failure.

Observing a tree planted in the earth in the middle of a forest and realizing the connection between the tree and the soil does not require deep thinking. The nature of the soil and the characteristics of the climate will determine the form and the size of the tree. Their impact on the surrounding will be limited by the amount of shades and degree of coolness or the heat providing life to the forest and enabling the animals to survive. A society -- any society -- is here symbolized by the good earth in which the Tree of Law is planted. The forms and the size of the Tree will differ depending on the nature of the soil and the climate.

Laws are diversified because societies are diversified. The fact remains that the Tree of Law is spreading its shades around and enabling people to live in whatever circumstances. Thus, if we conclude that law stems out from particular circumstances that face a society, it becomes incumbent on us to verify the relationship between the law and the social circumstances behind the formation of the law and its rules. Yet, in integrating the conception of law, in this manner, with sociology, economics, anthropology, history, and psychology, one seems to risk losing the conception of law and, therefore, its definition. Nonetheless, for the purpose of scoping this study, we can reach a definition of law through studying the formation and evolution of various social phenomena. Human societies evolved from hunting to grazing to agriculture and

eventually to commerce and industry, while striving for survival. Also, social order evolved, from communecracy to sole proprietorship, slavery, and feudalism and from there onward to capitalism and socialism. In this continual process, consequently, answering the query 'What is Law?' becomes a matter of relative perception that is highly influenced by the time and place, among other factors.

In order to divorce abstraction and touch the ground of reality as presented by legal jurisprudence, one can identify broadly two main approaches to tackle the problem of defining law. Whilst the first approach is overwhelmingly formal in its perception of the concept of law, the second one may be characterized as substantive.

The formalists define law as a set of binding rules that govern relations among people in a society. This approach emphasizes the study of legal reasoning, function of legal consistency, and the formal role of functionaries 'sovereign'. The formalists, thus, entertain a conception of law that is largely neutral in its relation to social stratification and value judgment.

The substantive or real approach, on the other hand, negates the proposition that law is an abstract concept imposed by a sovereign under the threat of a sanction. On the contrary, the conception of law, here, is tied to the life in a society, and to find it, it looks for assistance toward the sociological, political, economic, religious, and historical roots that underlie the formation and evolution of the legal order in the society. This approach concludes that a Legal order, being an intellectual product, is a reflection of the time and place of its formation and, therefore, Law is not an autonomous and independent phenomenon separable from social circumstances, which have existed with it.

Insofar as international law is concerned, being built on a slightly different premise, the approach is difficult to ascertain. At the outset, international law seems either trivial or indeterminate in that international jurisprudence, in its search for a normative source, oscillates between positivist and naturalist visions. Both seem incapable of resolving the conflicts between power and order

and both seem only tangentially relevant to the struggles of balance of power politics. Ensuing from this dual inadequacy, among other things, the international legal order fails to adequately address the challenges posed by the developing world, is unable to fully assimilate new actors and subject matters related to economic and social cohabitation and welfare, and appears more eager to dwell on the issues of peace and security. This weakness has led some scholars to view international law as a phenomenon only, and to contend that international law scholars exaggerate its power and significance.[2]

It may not be a mere accident that international legal scholarship has often been carried out as a debate over the existence of international law. And it is in successive resolutions of this fundamentally invalid inquiry that the progressive trivialization of public international law has taken place. That the debate may be rooted in the works of anthropologists renders it no less ethnocentric or misdirected. Each theorist seizes upon an attribute of law, which appears absent internationally and is countered by an explanation, which factors that attribute out of law. The structural simplicity, conceptual sophistication, and easy connection between theory and practice as well as the highly transparent historical development of international legal scholarship render it the perfect context for an exploration of these ideas. Because this study explores ideas rather than physical occurrences, and investigates the paradigmatic nature of international jurisprudence rather than the structure of international obligations and their fulfillment, it focuses almost exclusively on the discourse of international law rather than its rules or states' obedience (compliance) to them. Also, this study does not aim at arguing about the oppressive or anti-developmental nature of the international patterns of behavior, although it has some relevance in defense of the development of such an argument. Rather the attempt is to link various understandings of the scope and structure of justice and international law into a comprehensible whole in an overall context of development. This focus on discourse, of course, makes this study vulnerable to counter-intuitive factual examples or inconsistent doctrines. A trite response, in that

connection, would be that the thrust of the argument is to develop a way of appreciating (though not necessarily predicting) exactly such doctrinal inconsistencies. At a deeper level, some room is needed in the realm of application if only for beginning to knit a pattern of conflicting discourses.

Indeed, some of the inconsistencies may be explained as the shrewdness of the model. We are familiar with the ability of naturalists and positivists to mask their arguments in the language of their opponents; any linguistic formulation of conceptual contradiction (such as policy versus morality or justice versus predictability) would be uncannily "reversible" in an appropriate context. Through broadening the concept of law to sidestep the obsession with normativeness, and by subjecting both naturalist and positivist conceptions to parallel scrutiny can we escape the conceptual oppression of those outmoded paradigms. Only then might our conceptions come to pace with the modern interpenetration of primary and secondary actors, popular dissolution of the hermetically sealed sovereign nation-state, and the demands of the developing world.

The core contradiction has been expressed in a variety of ways as the problem of alienation, or as the tension between subject and object, immanence and transcendence, universal and particular, holistic and particulate, community and autonomy, custom and discretion, freedom and order, or altruism and individualism. The social problem of indeterminacy (itself a product of tensions within us between need and fear of others) engenders models of social order combining custom and discretion. Individuals, struggling with tensions between morality and power, can devise an infinite variety of solutions to the problems of value and order.

International legal scholarship, by embroidering ever more complex designs onto a fabric of discourse set in motion in 1648, through the Treaty of Westphalia, has expanded that fabric to cover an immense area. But it has done so by a process of thinning trivialization, which has exposed its inability to do any more than reenact the tensions, which gave it birth.[3]

This indeed accounts for the trivial, indeterminate, and anachronistic nature of contemporary international legal system, which fails to guarantee equity and justice, and confuses the discourse on development, primarily led by a small, yet powerful, group of elite countries.[4]

II

DEBATE ON JUSTICE, CHANGE, AND DEVELOPMENT

One position regularly, and almost emphatically, taken by scores of scholars on the issue of development is that unless the contemporary societies, communities, and countries, in the developing world reject traditional models of development[5] and restructure their basic economic institutions along sounder principles, most people from these societies will find themselves increasingly vulnerable to becoming the victims of an uncontrollable force of economic destruction.[6]

Indeed, the challenge, embodied in globalization, to the policy autonomy of states, particularly the smaller ones, flows from a very diverse set of developments. The integration of national financial markets into a single global system, which is a result of globalization, for instance, tends to exercise an indirect constraint on national policymakers.[7] Of course, "inappropriate" policy choices are not necessarily prohibited (by law), but their relative cost for countries will rise.[8] To avert the perceived destruction, scholars recommend the policies, laws, and institutions of developing countries to be harmonized with those of the developed world.[9]

But this position, *de facto*, benefiting only a confined group of the world population limited to a few nations, derives from a premise that aims at promoting the distribution of wealth in the world in a specifically geared fashion without taking real universal justice into account.[10] Indeed, the system favoring economic globalization (not global justice), particularly driven by financially elitist powers and the few industrialized countries, and promoting political power and hegemony, continues to erode the eventuality of a better system of justice.[11] This situation has led some scholars to emphatically note

that "the foundations of international law have been shaped by successive hegemonic powers throughout history."[12]

Interestingly, the ability of those minority groups who have the money and finance (and therefore power) to bring about changes in the world is seemingly invulnerable but is also the cause of the growing dissatisfaction of a majority of nations in the developing world.[13]

1. Tainted Justice

One of the causes leading to the dissatisfaction of many a nation is that the bottom line for decision-making under the current international system focuses, almost pervasively, on asset revaluation and maximization for the benefit of its selected members. A number of rights designed to protect both the generally conceptualized movable and immovable properties as also the intellectual, social, financial, and economic capital, including properties such as the right to transfer negotiable instruments, stock options, and other derivatives, are all designed to serve asset revaluation. Rights are intended to be protected to control assets and remedies are intended to be enforced to control the protection of the assets. Decision-making on politics, power as well as relations amongst states are all intended to safeguard assets, although oftentimes a moral touch veils the introduction of reforms emanating from such decision-making. Historically, and in essence, the situation has hardly changed over time. Indeed, the international law of the colonial period was carefully constructed to appear to be a neutral system while cloaking asymmetries of power. Also, the international law that was shaped in the colonial era was not a neutral discipline but, as noted by a scholar, an instrument of naked power, skillfully dressed up to hide its objectives of controlling the colonized world for the benefit of colonial powers.[14] To achieve this, manipulation of policies and institutions, including the law,[15] is commonplace, which occurs in several forms involving, *inter alia*, persuasion for buying willingness, capturing by force, or corrupting the participants and stakeholders in a weak position,[16] thereby disempowering many and denying justice for others.

Defining justice is certainly far from simple. Most scholars easily tend to generalize justice by referring to its attributes such as equity, impartiality, or fairness. However, concluding that justice is interchangeable with these attributes would be too hasty. It is far more profound than the attributes that can be explicitly attached to its achievement. The social, economic, and political (read power) context defines justice as the administration of moral rightness with conformity to truth, fact, and sound reason. Also, the lack of consensus about the scope and nature of justice creates tremendous confusion amongst scholars and students alike. Is justice meant to defend a person's individual right, family right, community right, or the rights of the world population? Is justice social, political, economic, or religious freedom and empowerment? Is there any similarity between human rights and animal rights?[17] Even more importantly, what is international justice? These are the questions that have yet to secure consensus response.

Similarly, many scholars propose a philosophical approach deriving from the social relativist school in their attempt to define the concept of justice. Simply put, this approach says that in order to have social peace, human beings must pretend that truth is in fact split. But this social relativist approach is also incompatible with real justice, because it pretends that all assertions are equal, without trying to determine which assertions are true, especially if an assertion makes a person uncomfortable or threatens such person's 'self-esteem'. In so doing, the social relativists actually abandon the search for truth, implicitly undermining the notion of accountability for one's action and behavior essential to achieve legitimacy for justice. The rules of accountability (responsibility) should apply to all for justice to prevail. It should equally apply to those who wield power (economic as well as political and nationally as well as internationally) or those in the service of the international community, the nation, and the general populace. Perhaps, influenced by this altruism, Jean-Paul Sartre felt totally comfortable to consider that justice had equal rank with liberty. The concept of justice is indeed a combination of ethical, social, political, and

psychological aspects of human life. Any definition, theory, or method which tries to define justice ignoring even one out of these dimensions is bound to be insufficient and incomplete. The fact that for centuries, diametrically opposed views have taken root in many different corners of the world and have driven the course of events, reflects the bona fide meaning of a true but multifaceted justice.

2. Belated Response

The politics of power and economic growth through free or controlled market has delayed serious discussions amongst countries over the fundamental issues of rights, justice, and development.[18] During the past century, one half of the world pursuing the capitalist motives attempted to rein the world by guarding against socialism, whilst the other half was busy criticizing the existence of the notion of capital itself.[19] To a limited extent, the postponement can be attributed to the nature of the debate, even its quality, which remained flawed, self-centered, myopic, even parochial in deliberations. That moment in history - whether under the Wall Street capitalist or the Moscow-type Marxist model for globalization - reined by vouching citizens against the loss of economic sovereignty and promising all nations of the world a chance to implement for their citizens a new, and bloodless, revolution.

As their search for a so called better life continued, the world missed the opportunity to avail the citizens of developing and transforming, and to a small extent, developed economies, something better than the outmoded systems of traditional socialism and capitalism. The debate that nations need to have the power to create property or wealth for the poor,[20] even if it means taking property from the rich, never became an agenda of the international community,[21] as it was not ready to serve the interests of the few rich and powerful states, dominant entities, and hegemonic corporations.[22] This is so perhaps because developed countries, victims of consumerism and self-enrichment, opportunity, insecurity, naiveté, and idealistic aggressiveness have too often created

a desire to impose a comforting order over lives, institutions, and foreign nations.[23]

It would not be incorrect to stress, here, that humanity can benefit from real justice only when all inequality (moral, social, religious, cultural, economic, environmental, political) is eliminated and all societies and communities are free to decide their own fate and design their own laws, thus dispensing their own type of justice. From a substantive angle, this is translated into creating and ensuring sustainability of justice and consequently development: sustainability not of a particular policy or the market only, not of a global institutional framework, nor the sustainability of the many assets that are created, allocated, or consumed, but the sustainability of life on earth taking into account all of the above. The alternative is a pendular swing between the old style equilibrium where law-making remains the monopoly of a few (capitalistic justice) and the updated participatory law-making (socialism in justice) where any period of stability merely serves as preparation for the next overthrow. This general pessimism is increased by the growing awareness of a force that is now perhaps greater than the power of any nation-state in the world, the force of equity and justice, not necessarily of economic globalization. This force continuously induces change in our behavior as well as our inherent thinking process.

3. Incomplete Change

History, of course, is witness to many changes, some more radical than others, whether in the Code of Hammurabi, the Code of Manu, the *lex romana*, or the judgment against segregation. Particularly noticeable were the changes that occurred toward the end of the medieval era in Europe when the pyramid of hierarchical powers consisting of seigneurs, barons, dukes, kings, emperors, and popes that operated not only like a religion but also a political community (the salient feature of the Christian society) began to be dismantled.[24] Meanwhile, the view that 'the king is master of his kingdom' became a common premise. Later, Thomas Hobbes's analysis of the contrast

between 'internal state order' and 'interstate disorder' along with the social pact was also an important change which allowed the establishment of the power monopoly of constraints ensuring the security of the members of the *social corpus*. Similarly, the idea that 'the relations between sovereign states are only governed by their strength' engendered the need for national egotism. In the 19th century, Heindrich Von Treitschke's dramatization of the vision of confrontation between sovereign state entities, which justifies the politics of power of State, and Raymond Aron's emphasis on the unlimited right to recourse to force, the distinctive characteristics of an international community becoming an asocial society,[25] continued to put pressure for change on the yet developing international law in a geared fashion, particularly with a view to leaving one's own imprints of interests and needs. As such, in spite of the numerous significant changes, the international society is still navigating in a state of anarchy where voices of all states do not carry the same weight. It does not constitute a real community where all states (and other actors) enjoy the same kind of rights and protection commensurate with their needs and aspirations and remedies guaranteeing the enjoyment of such rights. As a result, under the circumstances, a rights-based development approach can neither be designed nor implemented with a view to providing global justice.

Incrementally, the approach to decision-making under the current international system is devoid of all moral considerations. Adam Smith's concept of self-interest propounded by the *Wealth of Nations*, as a way that leads to welfare of the moral community, nowadays, generates doubts. Those standards of ethical conduct that hold society together, with emphasis on the general harmony of human motives and activities under a beneficent providence, are altogether ignored, at least from the viewpoint of sustainability of justice, although his concept of free market still holds true from an economist's perspective. Also his concept of *the invisible hand*, used to demonstrate how self-interest guides the most efficient use of resources in a nation's economy, with public welfare coming as a

by-product, cannot serve the interest of international justice. The 'selfish' therein becomes moral, and, as a result, in the international arena, self-interest, as the bedrock of nation-states, fails to deliver a positive outcome in favor of global justice.[26]

The reality of any conception of international law as merely a body of rules governing the relations between states is manifestly denied by the environment within which the current international legal order functions. States are today by no means the only participants in the external arena. This arena itself is an intensely dynamic system in which an immense variety of interactions between the various participants (states, international governmental and non-governmental organizations, sub-sovereign entities, multinational corporations, and individuals) occur simultaneously on different levels, blurring the classical understanding of international law wherein nations, almost exclusively, were its concern.[27] In such a context, it would seem easy to subscribe to Myres S. McDougal's all-encompassing view, which conceived of international law as a process of authoritative decision-making whose separately identifiable but intimately linked phases include the formulation, invocation, and application of community prescriptions concerning values that the various authoritative decision-makers seek to maximize, and a dynamic process by which the peoples of the world clarify and implement their common interests in the shaping and sharing of values.[28] But McDougal's view also leaves some room for question since the international law he describes as a 'process by which the peoples of the world clarify and implement their common interests in the shaping and sharing of values' is not entirely unpolluted; it systematically fails to promote empowerment and inclusiveness.

PART 2

PROBLEMS

III

ANACHRONISM IN THE INTERNATIONAL SYSTEM

However diverse and proactive the various actors, today's international system, essentially, revolves around the United Nations (UN), an institution created in the aftermath of the Second World War and following the failure of the system established by the League of Nations. Nonetheless, although six decades have passed by, with noticeable triumphs on a few selected matters, the UN is still limping on matters regarding global justice and rights, in particular due to its inherent power-sharing and participational flaws.

1. Power-Sharing Flaws

The predominance of self-interest without community welfare in sight produced, in 1945, a document called the UN Charter. The Charter is based on a minimal surrender of domestic jurisdiction, thus without any capacity for it to evolve in a genuine manner and depriving, in effect, the UN of any real jurisdiction. The continual manifestation of national, instead of international, interests prompted the promulgation of rules benefiting a few selected countries only. Also, the tri-focal coalition initiated in 1945 seemed ostensibly anti-developmental and reactionary in that it overvalued the political stature of many countries which were not true constituent states and overemphasized a balance of power based on an unidentifiable, if not faulty, equation.[29]

Certainly, because of the numerical increase in the UN membership following the process of de-colonization, and consequently due to the diverse characteristics of new members as well as their varied special relations with the permanent members

of the Security Council, significant modifications were made in the seventies to the few fundamental principles of the UN. According to many scholars, however, these changes were only circumstantial, which proliferated merely as a result of interpretation of the international clauses, not because of deliberate and generous move by the UN original members to comply with the pressing demands of developing countries for change. On the other hand, as important, to avert the eventuality of being dominated by a numerical (therefore automatic) majority held by developing countries, many developed States called for prescribing consensus as an indispensable element in the adoption of all major international resolutions. As confirmed, in 2005, by the Committee Chairman Mohamed Bennouna of Morocco, for example, the essence in the functioning of the Sixth Committee (the primary forum and one of the main committees for the consideration of legal questions in the General Assembly, in which all of the UN Member States are entitled to representation) lies in total consensus among UN Member States on resolutions dealing with wide-ranging international legal matters. In the Chairman's words, "For the Legal Committee it is not advisable to have any decision adopted by a majority, as we need consensus in the international community for its validity."[30]

The lack of effective and just power sharing and continual lust of all countries for grabbing more power are obvious in the international trading agenda developed, over the decades, in disguised forms and shapes. At the outset, three precautionary points are warranted. First, a significant portion of the regular international transactions is not yet part of the formal system. Second, the privately operated trading within the framework of multinational corporations (MNCs) or transnational corporations (TNCs) is not formally recognized. And third, there is still a big vacuum in the legal regime on a number of basic primary products.[31] Whatever the framework available and operating, enough evidence can be garnered to prove that the international trading system has been geared toward serving the interests of a few countries only, and as such is rigged

and not global at all.[32] In fact, it is not only the system that is rigged; the 'goalposts' are also constantly changing to serve powerful interests, resulting in effect, and in the process, in the disempowerment of the weak. Ironically, it is the process of increasingly empowering the powerful and the rich that causes the disempowerment of the poor and the weak. Not surprisingly, a rising tide, more often, drowns small boats rather than help them afloat.

With regard to trading specifically, it may be recalled that by the 1970s, major corporations in the developed world were outgrowing their national boundaries and local markets.[33] As a result, the traditional model of the sovereign nation-state with its national economy, national policy, national legal system, and more particularly, national identity was not considered viable anymore.[34] The number and size of companies operating multinationally had expanded rapidly and they were seeking out new markets along with innovative ways to circumvent domestic barriers,[35] leading to more focus on enhancing their own trade albeit under the garb of 'free trade' or 'trade liberalization'.[36]

Certainly, scholars consider the bashing of free trade as being spawned by a one-sided rhetoric (emanating from the anti-trade group) and consider it imbued with dangerous fallacies. Such scholars consider it wrong to state that 'rich country protection is higher than poor country protection'. Similarly, statements such as 'asking poor countries to lower the barriers when there are trade barriers in rich countries' or 'exports from poor countries fail to grow because of protection in rich countries' are also considered wrong.[37] But it is certainly not too far-fetched to rebut that the aforementioned school is viewing development from a trade, export, and growth angle (*de facto* advantageous for a few countries and corporations) only, and not from a global justice viewpoint.

The subservience to the interest of specific groups, for instance, can also be clearly noticed in the economic regionalism which developed in the form of free trade zones, customs union, or mere

cooperation arrangements, whether preferential or not.[38] The Treaty of Rome (1957), which created the European Economic Community (EEC), the Treaty of Stockholm (1957), which created the European Free Trade Association (EFTA), or the Lomé Convention (1975) between the EEC, on one hand, and sixty States from Africa, Caribbean and Pacific, on the other, which set in motion preferential agreements, and many other international groupings such as the Association of South East Asian Nations (ASEAN), the North American Free Trade Agreement (NAFTA), the Latin American Free Trade Agreement (LAFTA), or the South Asian Free Trade Agreement (SAFTA), were all aimed at creating blocs. Among other things, the above creations represented a belated, yet useful, response to the 'beggar thy neighbor' policies of the 1930s, which in part were also responsible for the great depression.[39] Within the system, thus, the protest groups attempted to generate a sustainable system for themselves. Also the initiative, launched in the 1990s to harmonize commercial laws amongst several countries in Africa through the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) is yet another interesting example of international focus shifting toward regional economic safety and toward developing a technique to maintain assets within the region in a sustainable manner. By implication the above shift was also an attempt to partly question the sustainability of the current international system and respond to the power-sharing flaws discussed above.

2. Participational Flaws

The General Agreement on Tariff and Trade (GATT), the flagship creation in the modern international trading system, was concluded on 30 October 1947 by 23 States belonging to the developed world.[40] By promoting negotiations between contracting states to reach agreements on tariff concessions, lowering customs duties and removing barriers in their trade, and requiring that its members grant one another the most favored nation treatment, the GATT *de facto* aimed at serving the interest of countries which had larger production

or distribution chains, although in theory it portrayed myriad noble objectives. Also, although the agreement was considered to be a broad and all-encompassing multilateral framework for international trade, in theory, a system for free trade without barriers, it became, in practice, a customs system. Certainly, a number of developing countries also gained increased access to markets from GATT negotiations because multilateral trading rules, in theory, assure all nations the same access that the trading partners negotiate.[41] However, the biggest winners were the highly industrialized countries, whilst many developing countries were not able to fully participate in trade negotiations. Concurrently, one does not need a magnifying glass to comprehend that because the main participants in GATT negotiations were industrialized countries, issues of concern for developing countries such as the escalating tariffs and barriers to trade in agriculture, textile, and garments were virtually excluded from the agenda, and an ominous silence was maintained on issues of basic primary products.[42] Also, as ironical as it may appear, until the early 1980s, the average tariff on industrialized country imports continued to be higher than the tariff on developing country imports and there continued to be more non-tariff restrictions on developing country exports than on industrialized country exports.[43]

The situation seems to have improved after the creation of the World Trade Organization (WTO), but there are still a number of issues pending.[44] During the Uruguay Round the applicability of rules was extended to a few areas that were not covered earlier by GATT. For instance, agriculture, which was *de facto* part of an exceptional regime, due to the complexity of the issues concerned as also the vested interests of certain commercial powers such as the European Community, was revisited and brought within the purview of the international system.[45] In the same vein, applicability was extended to textile and garments (multi-fiber agreements), until then governed by an 'exceptional regime' put in place since 1974, by and large, in contradiction with the GATT rules.[46] In addition,

the liberalization carried out through the Uruguay Round included services and intellectual property to the extent that they affected trade, and to a limited extent, investments. Whether the inclusion of intellectual property or services and investment is an improvement remains a matter of debate, but certainly, the asymmetry between the rich and the poor makes those concessions in goods very trivial. Also, it provides another glaring example that due to participational flaws essentially (preceded by power-sharing flaws) the lawmakers manage to have or change laws without any real participation, while revaluing successfully their own assets. More importantly, and ironically, the trade-related aspects of intellectual property rights (TRIPs) resulted from a gamut of negotiations that also led to inserting enforcement mechanism transnationally for monopoly, *de facto*, an anathema to free trade.

Actually, the old GATT rules were incorporated into the new WTO. But nevertheless they remain its core. These rules were extended into important and sensitive new areas so that free trade now encompasses trade in services (GATS) like, *inter alia*, banking, insurance, and financial services. However, all services are not included, and those excluded are often the ones in which developing countries have a growing advantage, such as construction and shipbuilding.[47] It may also be reminded that during, and in the aftermath of, the East Asian financial crisis, a huge increase of sales transactions was recorded in the region. Big corporations were sold for a very low price, the buyers being mostly TNCs/MNCs. Actually, the crisis in the region wherein performance was, until a few years back, referred to as the *East Asian Miracle*, was, *de facto*, caused by GATS. Indeed, State regulators, weakened by their obligation to zealously comply with GATS provisions, had failed to adequately regulate, and as such, the 'miracle' had become unsustainable. The coalition of forces that nourished the global vision of borderless international capital had sought to proselytize the end of the nation-state regulatory prowess and had been successful. This was pure and simple, no less an opportunity for asset grabbing by developed countries. But, as usual, the

international comity of developed countries continued to blame these countries for lacking in transparency.

The agreement addressing trade-related aspects of intellectual property rights (TRIPs), designed to promote the protection of national and international intellectual property rights (e.g., patents, trademarks) and integrate them fully in the free trade rules also gave rise to serious controversy, when pharmaceutical companies relied on it to try to stop South Africa from providing low-cost, generic treatment against HIV/AIDS. Thirty-nine pharmaceutical companies (including GlaxoSmithKline, Hoffman la Roche, Merck, Boehringer-Ingelheim, and Bristol-Myers Squibb) had filed a lawsuit to prevent South Africa's Medicines and Related Substances Control Amendment Act (October 31, 1997) from being enforced, which would increase access to life-saving medication for people with HIV and others in need of safe, effective medication. The complainants argued that their patent rights would be ignored by the law. Fortunately, following an outcry worldwide in April 2001, the lawsuit was dropped, allowing the production and use of affordable generic medicines.[48] The problem was resolved, but the deeply embedded thorn remains.

3. Conflict of Laws

The advent of new systems is not free of problems. New systems also bring new tensions. In the international system, in particular, tension is being created amongst the WTO regime, the municipal legal order, and the legal order of the European Community. A conflict of substance between international law and municipal law is, thus, theoretically possible, in addition to the fact that the difference between the monist and the dualist approach is bound to obscure the timing and applicability of the international regime on different countries.

Also, against the background of a relatively positive change toward what may be called a 'rationalized liberalism', questions may still be asked about the attitude of states in triggering the

different mechanisms available to them. But, for the purpose of this study, what is more interesting is that parallel to the encouraging measures to remove all tariff and non-tariff barriers, most if not all industrialized countries are introducing excessively tough rules to restrict the free movement of people from one country to another.[49] In an environment of free trading of commodities and services, the exclusion of labor is not comprehensible. People are, in fact, crucial in the drama of policy, institutions, and assets. The exclusion is unjust – therefore unsustainable – in theory, and leads to all sorts of dislocation and upheaval. The intent may well be justifiable for catering to the social aspirations or serving the security interests of a few developed countries; nonetheless the measures are anti-competition and protectionist.

The imperfections related to the sharing of benefits from trade regime liberalization were also highlighted, in largely economic terms, in 1993 by a World Bank/OECD joint report which estimated that out of the expected gains of US$213 billion from trade liberalization after the Uruguay Round, industrialized countries with only one-fifth of the world's population would gain $142 billion (two-thirds of the total). The same report noted that the LDCs, mainly in Sub-Saharan Africa and South Asia, would actually lose out from the process.[50] These figures were slightly updated during the Monterrey Conference, but the ratio of discrepancy still remains not much different.

As regards multilateralism, the progress made by the international decision-making system is certainly praiseworthy. The creation of GATT and the International Monetary Fund (IMF) contributed in establishing a new code of conduct in international relations as well as in accelerating the modernization of production mechanisms and integration of national economies, seemingly resulting in more justice and fair play.[51] In addition, attempts to fill the void in the area of primary products were made through the signing of a number of separate agreements on primary commodities. Whereas, for instance, the agreement on tin (which created a system

of stock for intervention), agreements on sugar or coffee (which created the idea of export quotas), and the agreement on wheat (based on the idea of price-fixing) were signed using the Havana Charter as a model,[52] some producers of primary products, such as the Organization of Petroleum Exporting Countries (OPEC), opted for solving their problems through an association (trust).[53] Moreover, in a similar vein, many other associations, including of countries producing bauxite, copper, iron, manganese, mercury, banana, tropical wood, jute, and so forth were also created in different forms and shapes, although none obtained the stature, prestige, and influence OPEC did. Nevertheless, whether highly influential or only quasi-significant, all these groupings serve one primary purpose: the economic growth interests of a few countries, not global justice.

In this context, it may be appropriate to emphasize that, of the several components of the current system, international trading has grown steadfastly over time, because it fulfills a number of functions, especially useful for industrialized countries. Through international trade, countries with surplus of some specific resources or efficiency in manufacturing certain products can exchange them for goods from other countries. Many countries rely heavily on trade to maintain their economic well-being, whilst there are also much less dependent ones, although most industrialized countries are more likely to be trade-dependent than the developing ones. As such, therefore, it is logically imperative from the industrialized country's angle to better define the rules of the trade game, although such betterment may be without full consideration of the real trickle-down effect of trade on non-industrialized, thus marginalized, countries, as well as its effect on global justice. More precisely, for the private commercial transnational conglomerates, it is important to protect their technological superiority, to eliminate all the barriers to trading freedom, to guarantee the security and returns on international investments, and more generally to eliminate all legal constraints in favor of 'contractual freedom' with, for example, *'Companies-States'* contracts, or flexible labor laws.

This is where the most crucial problem – the difference in living standards between the countries of the industrialized world as opposed to the developing poverty stricken world – becomes a relevant topic, which has never been touched upon by the international community within the current system, except for providing lip service. The discussions over the needs of the poor and the sacrifice of the rich have not resulted in a consensus, yet another dimension has been added in the agenda by linking trade with human rights issues.

IV

CONTRADICTIONS IN TRADE AND HUMAN RIGHTS INTERPLAY

There is an interesting if somewhat confusing parallelism between the international trading system and human rights. At present time human right, which has a broad connotation, should be considered within the framework of economic globalization characterized by an unprecedented development of trading of goods and services. The term globalization focuses essentially on the globalization of the economy and of the market,[54] not on the value of a human life and not on the level and quality of justice and equity globalization can ensure.

From an international law standpoint, world trade and human rights have one commonality. Although seemingly involving two distinct processes, both entail an internationalization of law: extension of legal norms beyond the national frontiers, and as such, extraterritoriality and imperialism of laws, and colonization through laws.

In an era where physical boundaries still continue to delineate the territories of states, the current trading system entails the supremacy of networks over state territories. Stemming from the *modus operandi* of multinational and/or transnational corporations (which favor a global strategy), trade networks (which are transnational in form) are also structured by, and involve, economic actors worldwide.[55] Parallel to the trade-related legal framework, an independent framework for human rights laws has also developed which takes a slightly different approach to control power and professes a completely different concept of globalization: the *ethical universalism* as enunciated in the 1948 Universal Declaration of Human Rights. The Preamble to the Declaration proclaims that human

rights are 'a common ideal to be reached by all the people and all the nations, for all the individuals and all the bodies of the society.' Certainly, the full-fledged implementation or enforcement of the proclamation still remains a challenge. Nevertheless, with the signing and ratification of the UN Covenants and of the regional and global conventions on the protection of human rights together with a progressive creation of the judicial control mechanisms, it is now possible to oppose State, or obtain the condemnation of a State, for human rights violations. To that extent, thus, it is also possible to refer to a supranational law in this field, although the argument regarding 'who the lawmaker is', in this context, becomes even more pertinent and blurs the debate. It would seem futile to emphasize that Nation-States based on absolute self-interest are neither in a position to empower, nor are they willing to empower which could translate into less power for them. The antinomies and contradictions in the rules made by the lawgivers abound and affect significantly the dispensation of international justice. Therefore, unless there is an international community of interests that springs from justice and sustainability, the supranationality referred to above cannot be unequivocally validated. An interesting example can be found in the debate surrounding the role of international bodies in combating corruption, an agenda that can only become credible if the supply side of corruption were to become the main focus.

1. Dualism

The existence of two distinct and successful processes can be primarily noted in Europe, symbolized by the creation - within the European Union and the Council of Europe - of two supreme courts, one for human rights (in Strasbourg) and the other for trade and economic issues (in Luxembourg). The dualism of processes can also be noted at a global level. For instance, the increasing influence of the WTO (dealing with the exchange of goods and services), in addition to that of the UN (which deals with the protection of human rights) or that of the International Labor Organization (which is called upon to play an increasing role in the negotiations of social

covenants), also provides an example of parallelism in processes.[56] With the evolution of each of the normative entities, their outcome may morph into a normative blend, and simultaneously promote dualism (or pluralism) in norm-making, something that is best when kept at a distance.

The risk of duality is not unreal. Some international jurisdictions such as the Court of Justice of European Community (CJEC) have already taken the route to not necessarily applying general international law principally. The CJEC has oftentimes taken diverging position in connection with certain well-established principles of general international law, in particular, in connection with the Law of the Sea or the extension of State jurisdiction. It has looked into those issues often in light of the question of allocation of jurisdiction amongst the European Union members, and has, in such context, ruled in favor of the European Community law. In 1992, for instance, the Court was confronted with a dual nationality case involving a person holding a European Union citizenship as well as a citizenship outside of the European Union,[57] in which one of the parties was strongly questioning the precedent set by the Nottebohm Case (Liechtenstein v. Guatemala, ICJ, 1955) by referring to it as having been established *during the romantic period of international relations* and ignoring a well established principle - that of effectiveness as a condition for invoking nationality.[58] The above argument certainly undermined a well-established precedent in international law.[59]

The coexistence as well as interdependence of international trade and human rights are implicit in the Preamble of the Universal Declaration of 1948, which prescribes the liberation of men from fear (civil and political rights) and misery (extreme poverty). From a legal standpoint, therefore, reconciling world trade with the protection of human rights, particularly relying on the principle of the indivisibility of all fundamental rights, is possible. Certainly the drafters of the Declaration opted for such reconciliation while referring to the principle of fraternity and inserting certain economic, social, and cultural rights alongside the civil and political rights.

Reaffirming the application of the fundamental rights is thus critical to ensure compliance with the principle of equal dignity, referred to in Article 1 of the Universal Declaration.

2. Inherent Tension

Tensions due to conceptual differences amongst the areas covered by specific branches of international law can be noticed in many forms. For instance, there are contradictions between State sovereignty (under which non-interference in the domestic affairs of another country remains crucial) and human rights (under which interference would sometimes be justified). There are also contradictions between State sovereignty (under which the right of the people to choose a political, economic, cultural, or social system would be crucial) and human rights (under which imposition of a democratic polity and free market would be justified). And finally, there are contradictions between State sovereignty (where national autonomy would be crucial) and interdependence (where national autonomy is *de facto* circumvented). Whilst, indeed, it may be safe to emphasize that today's globalized world requires relinquishing sovereignty in some sense,[60] these contradictions actually represent the core of the riddle of the system promoting non-interference as a rule, and ignoring that justice requires rights, recourse, and remedies, among other things.

Despite the contradictions noted above, world trade and human rights provide complementarities. Each of the processes leads, through different means and risk-mitigation, toward the internationalization or globalization of law. At face value, this comment may sound beneficial and positive, but, viewed more carefully, both world trade and human rights are currently sucked into the trap of hegemonic globalization.

In a sense, the hegemony through international trading is not a totally new phenomenon. Each major nation has exercised hegemony one way or the other: colonial England, France, Spain, Portugal, or Holland in the past, the Soviet Union from the fifties until the nineties, and the United States after the collapse of the

iron wall. Also there are hegemonic powers in each and every region and continent, each trying to mold the peripheral countries to serve its own interests. In law, averting hegemonic globalization is oftentimes attempted by granting extraterritoriality[61] to national laws. However, in order to avoid situation where the grant of extraterritoriality would contradict international law, the establishment of a reasonable link between the specific issue in point and the State is required, such as in the case of sanctioning illegal acts committed by non-nationals, which bear 'substantial effects' on the national territory.[62]

If it helps averting hegemonic globalization, the same extraterritoriality can also lead to the globalization of laws from the industrialized and rich countries. The hegemony may take the form of export of national laws to newly emerging or weaker countries, thus becoming an influential factor in the culture and economy of those nations without the need to resort to any territorial occupation or even any investment in their economy. Neo-colonization, to some extent can thus begin simply by exporting (in many cases imposing) the legal system and, as a result, totally damaging the social, moral, and organizational fabric of the country concerned.[63]

The fact that for the last several decades, in the financial arena, a number of states have been persuaded to attract foreign investments through the adoption of legislation and conclusion of treaties most favorable to foreign investors is a clear case of law becoming a tool for economic exploitation.[64] Indeed, these legislations and treaties provide specific protections and guarantees for foreign investors. They also usually address admission of an investment (definition of investment), obligations of fair and equitable treatment for investors, commitments by a host state to full protection and security, and provisions on expropriation (laying out conditions upon which it will be permitted, including a commitment for compensation), and dispute settlement.

As such, these investment laws, many scholars have confirmed, did not necessarily increase the investment levels in

those countries. Inversely, foreign investments are still flowing in many countries, which did not adopt any law at all. The lesson deriving from the above is multifold. First, in any case, the potential benefits and impact of new laws should always be carefully and realistically assessed. Second, laws alone are not enough to generate confidence amongst investors. And third, most importantly, such laws were required of the countries as a prerequisite for foreign investors to import capital into the country. But such foreign investment protection laws, coupled with the several bilateral investment treaties, were also, in an implicit manner, a means to protect and maximize the value of assets as also an example of the manipulation of institutions and laws to serve some specific purpose.[65]

There is also another risk for a more radical type of hegemony, stemming from the weakening of legal systems by the market, resulting in the emergence of lawless zones, which are subservient to international capital. In other words, the market replaces the nation, imposes itself on the State, and becomes itself the supreme law.[66] Implicitly, the 'world trade law' consisting of a mosaic of polymorphous and mobile normative entities, which facilitate what may be called a 'shopping forum' leading to selecting the most favorable system for commerce, will *de facto* continue to serve the interests of large corporations[67] and will not necessarily be favorable for a global justice-based system of development. Actually such trends are already emerging, in parallel, at regional as well as global levels, although the related legal approach is not always the same. That is so, in particular, because the need for harmonization, which emerges with regional integration, is currently ignored by the WTO, a classical interstate organization favoring a technique of network of agreements (and appendices). This is where the dilemma and irony of the international system can be noticed. The objective of asset revaluation leads to first creating institutions and later on to the crushing of institutions leading ultimately to bad policies. An eventuality of 'no law' therefore meaning no 'real system' substantiates thus the unsustainable character of the current system.

Clearly, the international legal order is becoming significantly complex. It is being diversified continuously within the broad area it is expected to regulate. Concerned with increasing efficiency in the implementation of new rules, mostly emanating from the creation of juridical norms based on new scientific and technical findings, the world's attempt now is to search for methods and procedures to implement the specific modes of conflict resolution. In that sense, a sort of 'normative feudalism', each specific regime considering itself self-sustained, is being created. But this hides substantial risk in the sense that it can lead to proliferation of international jurisdictional institutions, which normally ought to be limited, if only to ensure harmony of case laws regarding the interpretation of rules of general international law, whether primary or secondary.[68] Coherence, which is indispensable to ensure formal as well as substantive unity in the international legal order, is being destabilized, thus adding further to non-sustainability of the international system. An unjust system which is becoming increasingly unstable will eventually be unsustainable.

3. Mirage of Universality

To supplement the above line of reasoning, it may also not be inappropriate to point out that the Declaration of 1948 on human rights was largely an outcome of the Western cultural hegemony.[69] Although the eighteen members of the UN Human Rights Commission, who drafted the Declaration, were of different origins, there is ample evidence of influence from the Western political thoughts, propagated by the industrialized countries.[70] Whilst measures that can be easily and efficiently implemented in countries displaying a certain level of political and economic strength have gained prominence, the economic, social, and religious impediments of a large number of countries, which have difficulties implementing such measures, were not given due consideration. In that context, one should not forget that imposing the same rules and standards on all countries is based on the premise that all countries are of the same economic, cultural, and political stature, which is hardly the

case in the present world. The imposition of the norms of hegemonic origin results in added confusion for the majority of the countries where all the standards can be neither economically sustained, nor socio-politically implemented. Indeed, no one country can expect to deliver, in a fully satisfactory sense, all the required goods and services to the citizen. What may be considered basic needs in France, Japan, and the US for instance, may be considered luxury items in Ethiopia, Mali, and Nepal.

Certainly, the UN Declaration on Social Development adopted on December 4, 1986 by stating that the development is a global economic, social, cultural, and political process, confirms, in theory, that all human rights and fundamental freedoms are indivisible and interdependent, and need to be interpreted and applied as a coherent and indivisible whole. The indivisibility theme, implicit in the Universal Declaration, is primarily an achievement to be consolidated by granting a binding force to all fundamental rights. But in an uneven playing field, achieving the protection and promotion of civil, political, economic, social, and cultural rights that deserve equal attention by all countries, is a mere utopian ideal.[71] In addition, the challenge remains in the acquisition of such binding force not only over states but also over different non-state economic actors worldwide. Therefore, if the introduction and enforcement of human rights laws should become binding over states, it is equally important to enable such states to provide their citizens all basic needs. If the suppression of main civil and political freedoms has well known consequences on the economic dynamism and social cohesion, the lack of basic needs also affects dispensation of real justice.[72] It is important to note that as always, for all rules or norms to have an effect, appropriate remedies are *sine qua non*.

In this context, one may argue that the international trading system specifically provides some, albeit inadequate, incentives. But, throughout the international system, the real incentive of empowering individuals and states is not only missing but is reversed. The *de facto* decision-makers have interest in maintaining the *status quo*, except when the individual countries, as empowered, can be

amenable to assisting them to fight their famous five wars against terrorism, disease, drugs, migration, and environmental degradation.

4. Inadequate Remedies

Although scholars generally agree that corrective measures in this area (lack of universality, unequal treatment of countries, uneven level-playing field) are more than justified, they fail to propose any solution other than political, which, in any case, happens to be only one piece of the puzzle. In arguing about the political aspects of human rights, they often attempt to demonstrate a correlation between democracy and human rights.[73] But the generally prevailing sayings that 'democratic rights and human rights are intrinsically intertwined' and 'it is impossible to have one without the other' are mere ideological rhetoric, which hardly hold empirically. England, with a Magna Carta dating back to the 13th century, did not refrain from colonizing half of the world and abusing the human rights of Africans, Asians, Natives, and the Irish for several centuries. The descendants of the French revolutionaries, who proclaimed *liberté, égalité et fraternité*, and issued the most revered instrument – the *Declaration des droits de l'homme et du citoyen*[74] – from the Bastille in 1789, did not refrain from disrupting, for the sake of empire building, the social, economic, and political fabric of the Africans, Algerians, Haitians, or the Indo-Chinese, till recently.[75] Similarly, as noted by a scholar, "the founding fathers of the United States, while proclaiming and defending the inalienable rights of man and the liberties of the individual, forgot to include in either definition the Negro slaves on whom much of the prosperity of their country, then, and till much later, depended".[76]

Indeed, the world is not short of countries, which have guaranteed all *democratic rights* to the citizen in the books, but have continuously failed to ensure any 'human rights' for people in practice, and have not hesitated to perpetrate brutal inhumanities including ethnic cleansing or religious persecution. In any continent, it is easy to find countries, which preach one thing and practice to the contrary.[77] At this juncture, it may even be sardonic to recall

how Hitler won a landslide victory after the issuance of his statements about the rights of the 'superior race', or to question the 'majority-minority' nexus of politics, which completely lost relevance during the genocide in Rwanda or Kosovo, or in the forced displacement of the Bhutanese Lhotshampas, or to respect the 'notion of political will', which changed the fate of people in Somalia, Cambodia, or even Afghanistan. It may not be totally wrong to contend that majority rule undermining the rule of law is not so uncommon a practice in many countries and continents.

Clearly therefore, instead of being mired in the human rights rhetoric only, it is important to search for the reinforcement of control mechanisms as well as remedies (including the rights of all victims to adequate compensation governed by rules on international torts and liabilities) that are necessary for all economic, social, and cultural rights to become binding over states. It is needless to stress that without the right to adequate food,[78] proper housing, or education (or basic needs, for that matter), for example, most of the civil and political rights such as the right to vote, the trade union freedom, freedom of association, of assembly, or the right to property which is both civil and economic, individual, and collective, become meaningless. In this context, it may be appropriate to recall the former Chief of the UN High Commission for Refugees, Mary Robinson's emphatic conclusion that "Poverty itself is a violation of numerous basic human rights."[79] Also appropriate is the UN High Commissioner for Human Rights, Louise Arbour's comment that "the realization of economic and social rights is in some respects an inherently political undertaking, involving negotiation, disagreement, trade-offs, and compromise. But political processes do not serve all equally. Equality of opportunity requires that the most disadvantaged be empowered to participate meaningfully in all spheres of life, including in the political and legal processes."[80]

5. Recourse to Domestic Law for Added Clarity

Whether as a legacy of history, progressive attitude of political actors and revolutionaries, or positive scholarly and academic influence,

many countries in different continents have also attempted to include the types of rights discussed above in their organic laws or constitutional framework.

(a) Constitutional Recourse

Of the constitutional recourses, the most notable are Articles 26-29 of the Bill of Rights attached to the 1996 South African Constitution that entrench a cluster of socio-economic rights essential for adequate standard of living, including human rights to housing, access to health care, sufficient food and water, social security, and education. The justiciability and enforceability of these rights have been put beyond question by the jurisprudence of the South African Constitutional Court, which has upheld claims for the violation of socio-economic rights in a series of landmark judgments.[81]

A similar trend is noticeable in South Asia, where constitutions have focused on developmental issues in various forms. The Constitution of India, for instance, opted to deal with the issue of development in an elaborate manner,[82] by stipulating that the State has to strive to promote the welfare of the people by securing and protecting a social order in which social, economic, and political justice informs all the institutions of the national life, to minimize the inequalities in income, and to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[83]

In fact, the State is required to direct its policy toward ensuring that: (a) the citizens have the right to an adequate means of livelihood; (b) the ownership and control of the material resources of the community are so distributed as to best subserve the common good; (c) the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) there is equal pay for equal work for both men and women; (e) the health and strength of workers are not abused and citizens are not forced by economic necessity to enter a vocation unsuited to their age or strength; (f) children are given opportunities

and facilities to develop in a healthy manner and in conditions of freedom and dignity, and are protected against exploitation and against moral and material abandonment.[84]

What is noteworthy, here, is the fact that in many respects, the Directive Principles of State Policy of the Indian Constitution go beyond the UN Declaration on the Right to Development.[85] There are, for example, provisions related to equal justice and free legal aid, organization of village panchayats, right to work, education and public assistance in certain cases, provision for just and humane conditions of work and maternity relief, living wage for workers, participation of workers in management of industries, provision for free and compulsory education for children, promotion of educational and economic interests of weaker sections, duty of the State to raise the level of nutrition and the standard of living and to improve public health, organization of agriculture and animal husbandry, and protection and improvement of environment and safeguarding of forests and wildlife.[86]

Although not as elaborate as the Indian Constitution, but no doubt emulating therefrom, the Constitution of Nepal also dealt with developmental issues. For instance, the chief objective of the State is to promote conditions of welfare on the basis of the principles of open society, by establishing a just system in all aspects of national life, while at the same time protecting the lives, property, and liberty of the people. This fundamental objective is expected to be met through the fulfillment of certain economic and social objectives.[87]

In a similar vein, the fundamental responsibility of the State under the Constitution of Bangladesh[88] is to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens: (a) the provision of the basic necessities of life, including food, clothing, shelter, education, and medical care; (b) the right to work (meaning the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work); (c) the right to reasonable rest, recreation, and leisure; and (d) the right to social security

(including public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases).

A more all-encompassing approach has been taken by the Constitution of the Islamic Republic of Pakistan,[89] pursuant to which the State has to: (a) promote the educational and economic interests of backward classes or areas; (b) remove illiteracy and provide free and compulsory secondary education; (c) make technical and professional education generally available and higher education equally accessible to all on the basis of merit; (d) ensure inexpensive and expeditious justice; (e) make provision for securing just and humane conditions of work; (f) ensure that children and women are not employed in vocations unsuited to their age or sex, and provide for maternity benefits for women in employment; (g) enable the people of different areas, through education, training, agricultural and industrial development, and other methods, to participate fully in all forms of national activities; (h) prohibit prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements, and the consumption of alcoholic liquor other than for medicinal and, in the case of non-Muslims, religious purposes; (i) decentralize administration to meet the convenience and requirements of the public; (j) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; (k) provide for all citizens, facilities for work and adequate livelihood with reasonable rest and leisure; (l) provide for all persons, social security by compulsory social insurance or other means; (m) provide basic necessities of life, such as food, clothing, housing, education, and medical relief, for all such citizens, irrespective of sex, caste, creed, or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness, or unemployment;

(n) reduce disparity in the income and earnings of individuals; and
(o) eliminate *riba*.[90]

(b) Defined Monitorable Rights

From the above review of the constitutional provisions, which is only a small sample of what exists in the world of constitutions, a number of indicators, which can have a significant impact on the integration of rights and development policies, can be identified. Among others, they include the right to food, education, health, shelter, environment, and livelihood; rights of women, minorities, tribal people, children, aged, manual scavengers, and the disabled; the right to good governance; the right to corruption-free administration; and even the right to information. In pursuing a human rights-based approach to development, additional indicators that stress participation, empowerment, transparency, accountability, and democracy are also required to measure the level of enjoyment of human rights.[91] Furthermore, indicators related to the access to justice, right to survival, right to development, and participative governance, including representation are equally relevant and important. These indicators, when couched in the language of rights, can be a vital tool in initiating reforms in governance and in impressing upon the government that the task of implementing these reforms can no longer be considered purely an administrative burden, but a legal obligation and a duty of the government. Further, it may be argued that non-implementation of such duties may result even in sanctions under appropriate circumstances.

Indeed, countries have attempted to identify and broadly define their problems of developmental rights. To have a particular right is to have a claim on other people or institutions or countries that they should help, assist, or collaborate. This insistence on rights and corresponding duties takes the international governance debate beyond the idea of human development and links the human development approach to the concept that others have duties to facilitate and enhance development. Further, with the involvement

of duties come a host of other concerns, such as accountability, culpability, and responsibility.

Nonetheless, identifying problems is one thing, but operationalizing them in terms of strategic solutions is another. Observance of any particular principle of policy or the right to solve such problems may depend upon resources available for the purpose. Many countries are, from a resource angle, unable to ensure implementation of such policies. That is where international solidarity becomes even more relevant and significant.

6. Demand for Solidarity

The debate on the fundamentals of right-based development, to serve a real purpose, should favor an articulation between the equal dignity of all basic freedoms, and the civil, political, and economic solidarity. Indeed, solidarity, which paves the way to a full integration of social rights and justice, would help ensure binding effects of rules over economic actors, although the issue (of binding force over economic actors and, in particular, over multinational enterprises) calls for debate about the nature of the legal and political means, and would help ensure the use of market mechanisms to compel them to respect human rights.[92] In political terms, the binding effect of human rights over the economic actors seems impossible without an enforceable minimum standard of living and social rights for everybody in the world, not only countries but also people. In order to guarantee for all human beings a condition in which human rights lead to an alternative globalization, a social link, which is not reduced merely to its mercantilist component, needs to be established at a global level. In addition, a link has to be established between the *soft law* (self-regulation by way of ethical rules or codes of conduct) and the *hard law* (compulsory rules sanctioned through legislation). The *soft law*, which precludes any external entity (or a court) to compel a corporation to respect its undertakings, to be credible, would need to be reinforced by certification procedures, including the establishment of external independent and impartial control. At a micro-juridical level, the

integration of these codes of conduct (or rules of ethics) in interpretation, for instance, of the right to work[93] or the right to competition,[94] would permit the termination of contracts or award of damages. At a macro-juridical level, these codes of conduct would be integrated into the transnational public order and could be considered during an international arbitration, thus acquiring a certain inherent, although relative, enforceability.

V

OLIGOPOLY IN INTERNATIONAL LAW-MAKING

A legal system generally reflects the moral and ethical principles of the social order it seeks to regulate, setting forth the rules under which people organize and act. By extension of this concept, international law is recognized as the legal system that has grown out of the continuous practice in the relations between sovereign nation-states, that is, as rules governing their external relations.[95] International law is normally expected to ensure justice globally. However, the reality of law-making in the international arena is such that justice and development still remain remote items in the agenda of the international decision-making fora.

1. Law-Making Apportioned

One law that holds in the relations between countries has already been noted above: the richer the countries, the more power they have in international decision-making and law-making. One could call it the Iron Law of Oligopoly under which the current decision-making structures allow wealthy countries to voice their concerns and objections, if any, throughout the globe more easily than those that are restrained in articulating their concerns and needs through any channel of communication, in particular, due to severe economic constraints.

The process of decision-making (ultimately leading to law-making) in international organizations is, thus, another important element, which is prone to injustice and resulting in anti-development. The international institutions have not been able to sufficiently take into account the needs of all its members. Thanks to several techniques of 'qualified voting', 'preferential voting' or

'vote quotas', perhaps the needs of a relative majority (albeit not necessarily a representative majority) are complied with, but the rules of the game systemically deprive the remaining segment from participating in law-making.[96] Moreover, a lack of adequate mechanism to ensure participation from grassroots specifically distorts the rule and entails absence of justice.

The rule of law, in fact, presumes participation in many forms. It presumes ruler's active participation in not breaking the law. Participation – that of countries – is equally important for sustainability of the system and to continue the five wars against illicit drug, unwarranted migration, disease, cross-border terrorism, and environmental degradation. But participation, as such, has remained only theoretical. For instance, the UN is the institutional enactment and the grand symbol of the goal of peace in the world.[97] The principal means chosen to meet the commitment is a multilateral recognition of the rights of all persons and nations and a systematic sharing of obligations and authority.[98] But the veto system within the UN, for instance, contradicts that spirit, and remains one clear example of injustice, strongly enforced and understandably feared, but certainly antagonizing and attenuating the whole notion of participatory justice. Under such a system, the needs of many can hardly be fulfilled if such needs go against the security and the economic or social interests of the selected few who retain the monopoly of decision-making. The power equation and approach to maintaining security emanating from the Yalta Accord[99] has changed since long resulting in a completely new power equation, but the power-sharing arrangement designed at that time has never been revisited, particularly because of the efforts to ensure artificial stability as desired by a few countries only intending to serve their security and their economic, political, and social interests, totally ignoring the plight of more than 150 nation-states in the world.[100] It may be ironical to recall that if the League of Nations was established as a reaction against the failure of classical international law to prevent World War I, the United Nations was created because of the failure of the League of Nations to prevent World War II.

Change, certainly, is difficult. As such, from a perspective of law-making, particularly in the context of international organizations, the pace of change (of rules) seems to have remained slow, yet evolutionary, and basically bound by 'duties to behave', rather than any radical substantive and paradigmatic change.[101] This is understandable for processes relating to economic matters because they always vary and are changing and imply evolutionary and flexible juridical framework adaptable to variable situation, but on other matters (social and political), the approach is clearly flawed. Therein emerges the need for drastic radical change, which means revolutionizing the classical and traditional thinking process.

One has to admit that the economic system, launched in the aftermath of the Second World War, following the 1944 Brettonwoods Conference, which created the International Monetary Fund and the International Bank for Reconstruction and Development, and the 1947 Geneva Conference, which gave birth to the GATT, did attempt to design an international economic system with a universal vocation spawning regional as well as universal economic institutions, as also rules and regulations on transnational economic relations, particularly with regard to large corporations located in different countries. But the universality, as expected, could still not be achieved and, instead, an international economic order of a neo-liberal type was created, again with a focus on lopsided distribution of rights on one hand and unequal burden of obligations on the other.[102]

2. Rights-Making Aborted

The majority of the developing countries protested the economic order and put pressure for a new deal in the relations between developing and industrialized nations. Such a new deal manifested on May 1, 1974, in a Declaration of the UN General Assembly proposing the establishment of a new international economic order (NIEO), which purportedly remains "one important basis of economic relations between all peoples and all nations". The Declaration, although adopted, could not, however, sail smoothly, as its fundamentals were never accepted by all *in toto*.

(a) Genesis of the NIEO

The NIEO, a program of measures mapped out by developing countries, was aimed at restructuring major areas of international economic relations. The foundation for this program was the above-mentioned Declaration, the Program of Action on the Establishment of a NIEO adopted on the same day, and the Charter of Economic Rights and Duties of States adopted on 12 December 1974.[103]

Whilst formal proposals for NIEO were brought forward at a summit meeting of the nonaligned movement in 1973, the origin of the NIEO can be traced back to the Havana Conference of 1948 and the economic and political tensions that had been building between the developing and developed nations.[104]

Recall that the economic performance of the developing countries had been, on an aggregate level, satisfactory in the 1950s. By the early 1960s, it started to be lower than expected. Many developing countries, disappointed with their growth prospects, started demanding a better deal, and rallying in such organizations as the Non-Aligned Movement they created the UNCTAD where they argued for fairer terms of trade and more liberal terms for financing development. The developed countries responded with pious declarations of good intentions, but continued to insist that the proper forum for any economic changes was the set of Brettonwoods institutions.[105] By the early 1970s, however, the postures of the developing countries were changing. A substantial shift occurred in the developing countries' perception of the gains to be had from economic relations with the developed countries under the existing rules of the game (the shift was toward the gloomier side). At the same time, they perceived their own economic and hence political power as a united group vis-à-vis the developed countries to be sufficiently substantial to warrant a strategy of effective trade unionism to change the rules of the game and thereby to wrest a greater share of the world's wealth.[106] In addition, a straightforward political desire to participate more effectively in decision-making on the international economic matters was evident.

Participation was demanded not merely to ensure that the developing countries' interests were safeguarded, but equally to assert their rights as members of an international community, and as a desired feature of a just international order.[107]

In that regard, it is worth noting that the success of the oil producing countries of OPEC in increasing petroleum prices substantially, starting in 1973, had served as a catalyst to pull together the developing countries in support of a call for NIEO in which their interests would be better represented.[108] This call integrated many of the proposals that had been discussed previously at UNCTAD and other world forums.

Specific proposals for changes in the economic system were also advanced at the Conference of non-aligned countries held in Algiers in September 1973. Following that, the Sixth Special Session of the UN General Assembly was convened for April 1974, which adopted a manifesto entitled "Declaration and Program of Action of the New International Order," and in December 1974, the General Assembly approved the Charter of Economic Rights and Duties of States.[109]

(b) Substantive Content

Plainly put, the NIEO was an instrument, which sought certain changes in the international system that would provide less developed countries the opportunity to build their way out of the never-ending cycle of poverty. The fundamental elements of NIEO were each State's full and permanent sovereignty over its wealth, natural resources, and economic activity; an integrated program for raw material exports; unimpeded access for developing countries' manufactured goods to foreign markets; transfer of technology; limiting negative consequences of the MNC and TNC activity and financing development; a reform of the currency system; and consolidation of cooperation.[110]

Several of the NIEO clauses stood out and included provisions regarding, inter alia: (i) adoption of an integrated approach to price supports for an entire group of developing country commodity

exports; (ii) indexation of developing country export prices to tie them to rising prices of the export of manufactured goods from developed countries; (iii) attainment of official development assistance to reach the target of 0.7 percent of GNP of the developed countries; (iv) linkage of development aid with the creation of the IMF's Special Drawing Rights; (v) negotiated redeployment of some industries of developed countries to the developing countries; (vi) lowering of tariffs on the exports of manufactures from the developing countries; (vii) development of an international food program; and (viii) establishment of mechanisms for the transfer of technology to developing countries separate from direct capital investment.

No doubt the most important provisions in the program designed to establish the NIEO dealt with the management and pricing of ten core commodities (cocoa, coffee, tea, sugar, hard fibers, jute, cotton, rubber, copper, and tin) and seven other commodities with slightly lower priority (banana, wheat, rice, meat, wool, iron ore, and bauxite). Specifically, the objectives of the commodity program were to achieve the reduction of excessive price and supply fluctuations and the establishment and maintenance of commodity prices, which in real terms are equitable to consumers and remunerative to producers. To achieve these goals, integrated measures were proposed, such as establishment of international buffer stocks, creation of a common fund to finance these stocks, signing of multilateral trade commitments, and arrangement of improved compensatory financing to stabilize export earnings. The foregoing permits us to conclude that these UN documents apparently attempted to affix blame for the low incomes in the developing countries on past exploitation under colonialism and neocolonialism.[111]

Along with the above-mentioned notable clauses, interestingly, the Charter of Economic Rights and Duties of States also included two basic and controversial propositions. First, it affirmed each State's full permanent sovereignty over its natural resources and economic activities, which were specifically set out to include the right to

nationalize foreign property in disregard of existing international laws. And second, it underlined that producers of primary products had the right to associate in producers' cartels and other countries had the duty to refrain from efforts to break these cartels.[112]

Confronted by the far-reaching demands for reform of the world's economic and social systems and the controversies noted above, the developed countries responded by calling for the Seventh Special Session of the UN General Assembly. This session, held in September 1975, was intended to arrive at a compromise between the developed and the developing countries and resulted in the issuance of Resolution 3362, which was adopted by consensus. This resolution basically endorsed the demands for NIEO, the ideas for price indexation, the 0.7 percent aid target, the SDR-aid link, and many other provisions originating with the coalition of developing countries. The United States along with delegates of other developed countries attached detailed reservations to the resolution, but its passage represented a symbolic victory for the developing countries. The negotiations leading to the resolution had the main effect of changing slightly the militant tone of the document leading to the incorporation of some demands for changes and programs proposed by the United States.

The US proposals were centered on the basic principle of maintaining the existing economic system and the provision of development assistance through increased trade liberalization, transfer of aid and technology through international organizations outside the direct control of the UN and creation of some programs for the stabilization of commodity prices, and creation of some buffer stocks creation of a fund to stabilize export earnings of developing countries and of agreements on coffee, cocoa, and sugar.

At the UNCTAD IV conference in Nairobi in May 1976, the proposals for the establishment of the NIEO were reworded slightly, but their essence remained unchanged when they were adopted as resolutions, with only the United States and the Federal Republic of Germany voting against. Most significantly, the conference laid out a timetable for the study and implementation of one of the

most controversial proposals involving the integrated program for commodities, giving them a bureaucratic life of their own and raising exceptions about their ultimate adoption.

The NIEO – the reaction of the developing countries to inequitable economic conditions, in the form of a strategy designed to alter the structure of the international system – was clearly based on premises of economic justice and balanced planetary growth. Designed to redistribute the wealth of the world economy in favor of poor countries, it essentially urged the leaders of industrialized states to choose the path of 'enlightened realism' by adopting policies which do not focus on maximizing the advantage of the rich states but on nurturing and subsidizing the struggling economies of the third world.[113] In view of this and, not surprisingly, although adopted easily (because of a numerical majority held by the developing countries), the declaration could not be accepted by all, in spirit, and the principles emanating therefrom continued to remain largely theoretical.[114]

Thus, the NIEO remained little more than a rallying cry for the developing countries. This failure stemmed partly from their lack of power in world politics, and partly because of disparities within the group of developing countries, which created divergent interests amongst them, thus barring them from carrying out a united joint movement. Many of the commodity schemes proposed turned out to be not just as proposals for stable prices, but high prices. In fact, the financial costs of implementing these programs were way beyond anything the developed countries were willing to fund.[115]

(c) Philosophical Perspectives on NIEO

From a philosophical angle, NIEO represented a series of debate over equity and an attempt to clarify its underpinnings in a broad context of international political relations, and trade and economic exchanges.

(i) Distributional Equity

Several economic aspects were inherent to NIEO. Among others, it fully recognized that the prerequisites of a more rapid economic

advance of the developing countries are their continued industrialization and their increase in the volume of non-traditional exports of manufactured goods, aimed at overcoming the economic disadvantages resulting in low-differentiation, i.e., specialization in the production of agriculture and raw materials. Furthermore, a rise in export earnings is essential to enable developing countries to cover the heavy service payments due on their external debt. Therefore, the developing countries aided by the developed countries were encouraged to improve their agricultural sector and the stabilization of primary product markets. The assistance of developed countries was also required in the process of industrialization of the developing countries.

Both the developed and the less developed countries were encouraged to strive for an internationally managed economic solution embracing the main factors determining the pattern of domestic and international productive investment. Consequently, the developing countries had to aim at greater economic independence by financing a larger percentage of investment out of increased domestic savings. The ability to do so was obviously closely correlated with their export potential and size of per capita income.

To consolidate the existing external debt of developing countries into a more appropriate maturity structure, the design of a system to reduce the commitments of the less developed countries to private banks and to ensure an increased flow of financial resources to the developing world, especially on a concessionary basis, was also sought by the NIEO. And, particular types of financial provisions (short-to-medium-term bank credit, IMF lending, long-term development agency finance, etc.) to match more appropriately the financial needs of the less developed countries (e.g., for short-term balance-of-payments finance, trade finance, project finance, infrastructure, and social investment, etc.) were also sought.[116]

Without uncertainty, the claims by the developing countries for NIEO formed a coherent whole, with a perfectly comprehensible logic. Substantial and sustained rises in raw materials prices, strengthened by debt reduction and more favorable conditions for

the transfer of technology, were the methods par excellence of improving the financial prospects of a new stage of industrialization. This industrialization, based on what conventional wisdom regards as 'comparative advantages', was conceived on the dual basis of relatively cheap manpower and natural resources allowing for exports to the developed world in an expanded network of world trade. The opening up of developed countries' markets to the export of the manufactures of the developing countries would, according to the conventional wisdom, serve the collective interest by making the international division of labor more responsive to the source of inputs.

In fact, the rise in oil prices at the end of 1973 strengthened the credibility of this program by showing that it was possible to secure alternative prices for raw materials, and that these were certainly not 'unbearable' for the developed world. It showed that the financial resources generated in this way could be devoted to an acceleration of industrialization in the beneficiary countries. Indeed, when the 1973 October war came, the overall effect was to transform rapidly a mere economic weapon into a historic experience. A producer's cartel (OPEC), for the first time, was able to prove its triple control: the control over production, the control of the market, and the control of the solidarity of its members through the creation of a common fund.[117] Also in this sense, October 1973 marks a turning point in the history of international relations, the moment of consciousness of the developing countries not of their rights but of their power.[118]

As can be noted, the NIEO was a program in total accordance with all the sacrosanct principles defended by Western liberal orthodoxy. It took greater heed than ever of the objectives of world economic interdependence and sought to place this on a footing of comparative advantages. It is an irony of history that the initiative came from the 'rationalist' developing world and was unanimously rejected by the apostles of the principles on which it was based! But the vested interests of the corporations and monopolies took a narrow view of the NIEO. To them it meant taking greater profit

from the cheap manpower and natural resources of the developing countries, by relocating segments of the production processes, which they themselves controlled. Under this strategy, relocation was not aimed at creating integrated national industrial economies in the developing countries, however outward-looking.

When the conflict of interpretations of the new order ended, however, the battle for the NIEO was also lost. The causes of the failure, still unclear, may well have been purely circumstantial (in the economic crisis), 'tactical errors' by the developing countries (their own divisions and weaknesses), or simply the impossibility of autocentric development at the periphery of the modern capitalist system.[119]

(ii) Ethical Equity

It should also be noted that economic behaviorism alone, was not the only feature of NIEO. The concept also needed to be seen as a part of a global pattern of cultural change (development). Therefore, based on a scientific approach, which included reliance on fact-finding, inductive reference and cross-cultural comparison, the NIEO believed in a holistic or systemic approach to development as the only legitimate approach. The principles, as expressed in the resolution of the UN on the establishment of the NIEO, were, therefore, not to be discussed in an abstract and formal manner only. Those principles were to be transformed into rules of international law. Special emphasis was needed on the recognition of the fundamental social rights - as a part of the system of human rights - not only on a national level, but also as a guiding rule of the transnational responsibility of states. Any global approach needed to include not only the aspect of fact-finding (descriptive level), but also the aspect of ethics (normative level).

Clearly, the proposed system of international economic relations was not exclusively related to 'pure' (immanent) economic concepts, but was linked, in its very essence, with ethical principles of mutual responsibility on a transnational level. It was necessary, therefore, that the common principles of 'social' policy, already

accepted on the level of national governments, be implemented as the rules of economic and diplomatic relations between sovereign states. Global interdependence made it necessary to give up the traditional 'national interest principle' as a guiding rule of foreign policy, and its replacement by the multi-dimensional concept of solidarity was sought.[120] It is this concept of solidarity that had difficulty penetrating the hearts and minds of all the countries and corporations.

3. Perceptional Interpretation

It is but normal for countries to attempt to draw an interpretation of any international clause to their own advantage. This has indeed been admitted candidly by some scholars in specific cases. For instance, as noted by a scholar in an American context, "it is evident to most thinking Americans that the conscience of our people is torn out between loyalty to the moral principles of justice and order, as recognized and codified in law, and traditional support for our government's actions in furtherance of the national interest, especially when many such actions seem out of accord with international law or even with common-sense justice."[121]

Although some scholars have been more candid than others, interpreting international law in one's own favor has not necessarily been the monopoly of a few developed countries only. In international fora, we can note, in abundance, such claims and contradictions. Interestingly, based on the notion of permanent sovereignty over natural resources, the developing countries question the acquired rights of foreign investors, and on the basis of their right to development, they claim compensation for inequality. On the other hand, the developed states base their argument on 'customs' to justify their 'acquired rights' or 'prompt and effective reparation', and rely on the principle of sovereign equality, to reject all discriminations amongst states whether compensatory or not, stating that such discriminations are contrary to international law.

An equally interesting and contradictory argument and behavior can be noted amidst the philosophy of the new states that

have been in favor of both abolishing existing unequal treaties and preventing the signing of new unequal treaties under coercion. While respecting the principle of *pacta sunt servanda*, they have reasonably applied the *clausula rebus sic stantibus*, and while faithfully adhering to the provisions of legitimate treaties, they stress that sovereign states have the right to have unequal treaties revised. Curiously indeed, considered as a compendium of rules transpiring from the will of states (Lotus Case)[122] for a long period of time, it is clear, public international law has, throughout decades, been used to serving contradictory interests, of its authors as well as actors.

There are also contradictions due to the differences in the normative content of the different sources of law, which are more obvious in the sphere of international economic law. States intervene only to the extent that their intervention is advantageous for them. Such interventions often take the form of resolution. As such, the law of development is essentially a law of resolutions, which aside from being imperfect, due to the ambiguity about the juridical value of resolutions,[123] is largely inefficient, because it fails to synthesize real contradictions.

From one perspective, the foregoing arguments provide some positive and productive justifications for rationality and logicality in law-making. But when dealing with power (the bottom line of current law-making) arguments get distorted. Indeed, the positive productivity of power is uncertain, as the interests are not always the same. Traditional types of international actions focusing on control of events, direct influence over others, possession of territory, peoples, and natural resources are guaranteed to fail.[124] That is so because of the large differences between societies, cultures, and states resulting in closely homogenous or extremely heterogeneous systems. The profound difference between homogenous and heterogeneous international system has been amply clarified by scholars of international relations. For the purpose of this study, it suffices to summarize that in a homogenous system, different states are organized according to the same principles and share the same values. An intensively homogenous society can also facilitate a

conservative limitation on internal violence, the insurgents considered like common enemies of all governments. In the heterogeneous system, on the other hand, every State claims a value and is organized according to contradictory principles.[125] From a law-making viewpoint, the societies today are heterogeneous to the extreme. Even within the same political unit, there is inherent heterogeneity and, as such, law-making becomes an indomitable challenge, full of perceptional differences. The prevailing international law-making, which is based on experiences essentially of societies that are homogenous (especially because international law most significantly proliferated in Europe, a confined group of relatively homogenous countries), therefore, does not work in the direction of providing global sustainable justice and rights-based development for all.[126]

VI

THE INTERDEPENDENCE-GROWTH DILEMMA

Actions throughout history have ostensibly confirmed that since all countries are confined to protecting their own national interests, none is really interested in protecting global interests (i.e., global justice). In complete reversal to the premise of Adam Smith, scholars like Hans J. Morgenthau, defending the realist view of international relations, systematically supported the view that diplomatic strategy should be motivated by national interest rather than by utopian and dangerous moralistic, legalistic, and ideological criteria.[127]

1. Political Interests

But the numerous problems present in the world still keep questioning the validity of the state-centered (nation-focused) approach. In this vein, some scholars like Richard A. Falk and Saul H. Mendlovitz attempted to identify the major problems facing mankind to include war, poverty, racial oppression and colonialism, environmental decay, and alienation, and suggested global objectives to control these problems. According to Falk and Mendlovitz, the global objectives should be to minimize violence, and maximize social and economic welfare, social and political justice, ecological balance, and participation in authority processes (governmental decision-making).[128] We are tempted to add the elimination of drug abuse, disease, and cross-border terrorism. In any case, the list as well as the objectives can be further expanded (depending on the geography, economic status, political priorities, or the social aspirations of the group concerned), but the ever present question is whether the current international decision-making and participatory system allows the world to achieve the goals. In the

spirit of Morgenthau who equates national interest with the pursuit of state power, where power stands for anything that establishes and maintains control by one state over another, it appears that global justice cannot become even a distant possibility. The reality of power and the need to evolve structures and processes capable of securing global justice appear to be irreconcilable. On the other hand, it is clear that the control of the assets is a key in the international system, which gives powers to decision-makers (law-makers) and therefore the riddle of power evolving policy and institutions – the premise of this study – becomes crystal-clear.

2. Economic Interests

All contemporary economists, whether belonging to the left, right, or the center, agree that the sum of the GNP of all nations is being distributed in an uneven manner.[129] However large and growing the planetary product, the wealth it represents continues to elude most of the world's population. Still ironically, all efforts continue to be put on increasing growth. It is, nonetheless, questionable whether continued growth will bring about a more equitable distribution of global goods and services. It has not yet been proven that growth alone has helped decrease poverty.[130] Rather, unmonitored growth may have contributed to increasing poverty and particularly widening the gap between the rich and the poor countries as well as the people.[131] Also similarly, growth does not necessarily engender any global right or security, nor does it assure empowerment, except in a very intangible sense. In connection with globalization, more specifically, Nobel laureate economist Joseph Stiglitz also noted: "For millions of people globalization has not worked. Many have actually been made worse off, as they have seen their jobs destroyed and their lives become more insecure. They have felt increasingly powerless against forces beyond their control. They have seen their democracies undermined."[132] As such, therefore, instead of focusing on growth alone, one should aim for a better and more effective system, which can be achieved only if the real distribution system and the thinking process associated with it were completely changed.

In this context, one may also insist that if there is a right to development, there is also a duty to make that development happen.

It may also be worth reminiscing, in this connection, that Adam Smith, in 1759 had, already, laid out his theory of morals, which quintessentially relied on the intense sociability of human beings. In his seminal work 'The Theory of Moral Sentiments' Smith had stated that more than anything, people have hunger for approval. People feel intense pleasure when they experience the sympathy of others. In a well-structured society, people's desire for sympathy leads them to restrain their selfish, egotistical behavior. Furthermore, people not only want praise, they want to feel praiseworthy. They want to act in ways that would deserve praise, if a wise, impartial spectator happened to be watching them. In their best moments, they want to live up to the ideals their society has gradually engraved upon them.

The above prose, a reflection of profound wisdom, is from the same Adam Smith, who wrote *The Wealth of Nations* that expounded the miracle of the pursuit of self-interest in creating wealth that all the powerful TNCs/MNCs and their sponsors decisively embraced. But the sociability of human beings and its resulting correlation with morals, from another treatise from the same thinker, is a part that no scholar easily brings forward while discussing the issue of power, globalization, and justice, despite its clear and obvious relevance. Not surprisingly, the TNCs/MNCs, and the countries exporting capital deliberately remain evasive about it.

3. Local Interests

In most developed nations, the two pillars of growth and interdependence have been, to some extent, intermeshed in the policy formulation, institutions, and in the domestic law and justice framework. But in the international arena, the pursuit of self-interest by the powerful remains unchecked by any expectation to experience 'the sympathy of others'. Some form of a resolution of this dilemma can also be noticed in the observation of how some developing countries, usually very large markets (such as China,

India, or Brazil), have been successful in 'glocalizing' transnational corporations by making them more sensitive to local authorizing environment, not unlike the corporate enabling environment in the developed countries. The size of the markets in these countries grants them extra strength in imposing on companies the compliance of locally designed norms and values. This is, however, not possible for all. As such, these types of cases are still very limited as two-thirds of the countries in the world still continue to hope for a better deal.

Establishing an Authorizing Environment at a global level to attempt to resolve the dilemma for the less fortunate countries is indeed much warranted for the sustainability of the current international system. In a sense, the two parts of Adam Smith drivers of human interaction should be allowed to play. A discipline has to be imposed on negotiators of trade agreements, or conclusion of any other international conventions, treaties, resolutions, or declarations generating any form of goods, works, or services, and aspects of relations dealing with production, supply, distribution, or sharing, to seek, in the future, not only efficiency but also equity and justice. The contents of the Authorizing Environment need to ensure proscription of deliberate hostile environment and prescription of only those norms that have obtained universal legitimacy. Even the smallest of states needs to be fully protected. Otherwise it can become a failed state, and that state of failure can become one important element of the hostile environment.[133] Also, in parallel, the introduction and implementation of rules, norms, and regulations authorizing TNCs/MNCs to realize that the cost of doing business will henceforth also include the right to development as a part of their efforts to 'glocalize' and help defray the hidden costs of a dysfunctional global legal, political, financial, and social environment need to become part and parcel of all international decisions. The opportunity cost could then increase, but through that, a modicum of equity will be secured.

Although seemingly costlier, the TNCs/MNCs are better off complying with the contents of the Authorizing Environment

beforehand. By doing that, in reality, they ensure for themselves a better deal as they will not be required to manage any future unknown and hidden costs arising out of claims by the host country people of their rights related to development. The TNCs/MNCs could ignore such claims and decide to go ahead without managing them, but a higher risk of unknown costs could then prevail. It is actually more difficult to manage a state that has already failed, rather than a state which is in need justifiably of more assistance. And it is obviously better to prevent a state from becoming a 'failed state', even if it means increasing the costs of doing business.[134]

4. Insufficient Debate

Significant thinkers of their times have implied that affluence rides upon the back of poverty.[135] Whilst agreeing fully with that thinking, it should also be emphasized that the structural causes of poverty and under-development are situated outside the 'center' of poverty where the symptoms and effects of poverty are expressed and manifested. Whether within non-formal, socio-cultural, and traditional systems of power hierarchies, or more formal legal and policy framework, the structural causes ensure perpetuation of the vicious cycle of poverty.[136] But scholars working on development issues have not always, deliberately or by default, attempted to disentangle the phenomenon, especially because development has always been referred to in the economic, political, or social terms, although the strategy to fulfill the development goal may have been different. Broadly stated, the orthodox strategists, while considering the vicious cycle of poverty, condemn the poor countries for remaining permanently at levels of economic subsistence, because of their lack of adequate savings, capital flight, and so forth. The radicals (neo-Marxists), on the other hand, are diametrically opposed to the orthodox strategists, and argue that the large-scale heavy industry and high automation economies of the industrial world are not the models for developing countries. Whether orthodox or radical, ultimately, all countries will have to choose one option for development. Whatever option a country decides to choose - whether

fully emulating one or the other model or taking the best and useful part of both models and adapting it to one's own specific situation - an all-accepted and all-encompassing international and just legal system including appropriately guaranteed institutional remedies is the single important element that can create a successful link between the social, economic, cultural, religious, and political elements of development, such development being justice-based.

PART 3

NEED

VII

THE NEED FOR A JUST LEGAL SYSTEM

There is no formula, no short-cut, and certainly no royal road to proficiency in the art of law-making. A formula, in fact, can be nefarious. Equally nefarious is the practice of transplanting laws: taking legislation from one country to be used in another. A legislation that has worked perfectly in Canada, for instance, even if it is about the same subject matter, may not necessarily work in China.[137] Also, it may be a futile exercise to attempt solving the problems of all the societies amidst the vastness of their differences, starting from those, which criminalize gum-chewing, bovicide, or public nudity to those who condone bribery, corruption, abortion, or same-sex marriage, in the name of satisfying their social mores or appeasing their political constituents. But certainly, law-making needs to integrate the spiritual needs and aspirations of the eventual subjects of a desired law and ensure enforceability through the subjects' existing behavior. Meeting such a challenge would be difficult, if not impossible, when transplantation of law is commonly, and perhaps naively, considered the best approach.

1. Religious Antecedents of Justice and Development

Unfortunately, for years, many scholars on social and economic development discounted the role of religion in the fight against poverty and social injustice, or worse, considered the religious beliefs of the people they intended to help as antithetical to progress. The early literature on development, starting with *The Stages of Economic Growth,*[138] even regarded the religions of peoples (particularly in the South) as an obstacle to economic development, because these religions often trusted the rhythm of nature, fostered social

identification with family and community, and failed to promote a culture oriented toward personal achievement and social mobility. Such a view, however, is now outdated and contradicted by myriad scholarly works already. In reality, all religions, religious beliefs, and texts deal with justice and development, and favor overall human progress, albeit with their own approach, metaphors, perspectives, and positions as to the notion of development.

(a) Hinduism

The wide range of sources and influences (along with the great number of sacred texts in ancient languages) makes the system of faith and practice of Hinduism (which was not inspired by one single prophet but rather evolved organically) almost impenetrable to the uninitiated and as such extremely broad in terms of approaching the notion of development.[139] As one of the oldest religions in the world, Hinduism provides a unique perspective on human culture and everyday practice and includes systematically therein the notion of justice and development. For instance, before the advent of British rule in India (where Hinduism prevailed for long), resolution of disputes, an important component of justice, had an important place in the society. All kinds of disputes were settled by the Panchayats in the informal setting of a village meeting. There were no written rules for such settlement. No government machinery was involved. The members of the Panchayat (who did not receive monetary remuneration) were elected by consensus among male adult inhabitants in a village, often for life, on the basis of their wisdom, social credibility, leadership ability, and willingness to help people in trouble.

Hinduism favors a holistic approach to development. Because life for a Hindu is a spiritual journey, the religion, in its definition of justice and development, does not concentrate simply on the question of economic well-being but also incorporates ideals of spiritual and socio-psychological satisfaction. It cannot become merely a means to fight off hunger and disease; it has to encompass the spiritual dimension.

(b) Judaism

Judaism, originating from the Old Testament, sees God as a symbol of social and moral justice, and repentance, as a requirement when one fails to live according to the Law. Stressing upon the deed (*miswa*) than the creed (*'ani ma 'amin*, 'I believe'), it emphasizes conduct rather than doctrinal correctness. With emphasis on certain beliefs and ethical values, its objective is a just and peaceful world order. In the *Mishnah*, one can see the broad philosophy that governed the minds of the early rabbis, who noted that the world is sustained: (i) by law; (ii) by (temple) service; and (iii) by deeds of loving kindness. This basic teaching is further underscored by the threefold function of the synagogue: as a house of study (for learning *Torah*), as a house of prayer (for worshipping God), and as a house of assembly (for caring of community needs).

Contemporary Judaism speaks of four foundational pillars of the Jewish faith, each interacting as a major force and part of God's covenant: (i) the *Torah*, a living law; (ii) God, a spiritual and eternal unity; (iii) the people, called into being by God as members of one family, a corporate personality, and a community of faith; and (iv) the land (known today as *Eretz Yisrael*), a bond going back to Abraham. In its modern expression, Judaism is shaped by the traditional beliefs that: (i) man is pivotal in the universe; (ii) man is a responsible moral agent, fully accountable for his acts; (iii) human progress is possible as man realizes the great potential within him; (iv) worldliness is a distinguishing mark of Judaism; (v) everything in life must be regarded as sacred; and (vi) man is to pursue peace, justice, and righteousness.

Whilst the system of law of Judaism, known as *Halachah*, regulates civil and criminal justice, family relationships, personal ethics and manners, and social responsibilities, the *Torah* discusses the social and economic subjects facing humanity, and prominently considers questions of poverty, social exclusion, and inequality. The fundamental principles raised in the religious texts, specifically relevant to development, are: (i) a person has responsibility vis-à-vis fellow humans; (ii) poverty must be eradicated; (iii) preserving

the dignity of the poor is an urgent priority; (iv) one must work to avoid gross inequality; (v) society must fight poverty and provide opportunities for the poor; and (vi) volunteering is an ethical obligation.[140]

(c) Buddhism

The Buddhist perspective of development focuses on awareness of oneself for attainment of peace.[141] This sense of peace, which is central, helps to reduce selfish desires and reconstitutes consciousness about the interconnectedness of all sentient beings. Realizing interconnectedness human beings are moved to act with wisdom and compassion to end suffering and all forms of structural violence. The understanding about the power of mindfulness and the relationship between individual and collective well-being is very similar to the relationship between individual change and material development.

The Buddhist goal of development is based on an understanding of freedom. Merely having a wealth of choice is not freedom. This choice should also be right, i.e., it should show compassion for all and should not be motivated by greed. The ideal of freedom is threefold. The first is the freedom from insecurities and the dangers of poverty, disease, famine, and so forth. This level of freedom, most influenced by advancements in technology and global cooperation in the name of meeting basic needs, is essential. The second is social freedom, which includes freedom from human oppression and exploitation (such a state presupposes tolerance, solidarity, and benevolence). This stage of freedom synthesizes the collective with the individual in terms of peace and progress. Lastly is the freedom of the inner life, the freedom from mental suffering, from insatiable desire, leading to accepting the cyclical, multi-causal, and inextricably connected nature of life (called *Nirvana*).[142]

Hence, the Buddhist view links development with the enhancement of individual spirituality within communities and the opportunity for understanding the deeper levels of freedom. To achieve this, there must be an inner realization concerning greed, hatred, and delusion and an outer realization about the impact of

these tendencies on society. There is a perennial emphasis on living in harmony with natural surroundings as well as an understanding about the wisdom of nature that cannot be exploited by humans. Indeed, all goods are thought to have 'use value' rather than an 'exchange value'.

The Buddhist model of development is more than material development with a human face. It is the development of an understanding of the interconnectedness of individual happiness and societal emancipation from greed, hatred, and delusion. Implicit in this model is a discussion about politics. Actually politics can never be devoid of ethics (even in so-called secular states), and is not just a tool to maintain order or protect national boundary. For Buddhism to survive, it must be supported by a just ruler *(dharmaraja)*, and the wheels of righteousness *(dharmacakka)* must influence the wheels of power *(anacakka)*. It is the ruler's duty to restrain the violent elements in society, discourage crime through the alleviation of poverty, and provide the material necessities to enable the citizens to pursue the religious life unhindered. Furthermore, the ruler must be a moral exemplar, fostering the ethics of compassion.

(d) Confucianism

Confucianism, a philosophical current that first developed in response to the political and social crises in Chinese society during the middle of the 1st millennium, actually, is a Western expression without a precise Chinese equivalent. Neither the Chinese value system in general nor Confucianism in particular exhibits universal homogeneity, in either synchronic or diachronic observation. Crucial ambivalence and room for interpretation are present even in the fundamental Confucianist texts. From the beginning, its history was marked by syncretism and compromise, and by concurrent attempts toward cleansing the 'foreign' problematic elements and reestablishing the correct tradition. However, with varied images in historically and sociologically sophisticated perspectives, Confucianism is, first and foremost, a set of ethical rules with secular, practical goals of a moral and decent lifestyle.

The early Confucianists saw a way out of the crisis gripping Chinese society through reclamation of traditional mores, which had to be grounded in a new internal morality. Accordingly, internalization of ethics arose, which was reflected in strong self-referentiality of participants and in norms becoming reflexive, without, however, dismissing the preexistent ethos. The rules of moral behavior were differentiated according to status, sex, and role. Without these rules, for Confucius, a person was 'without standing'. The Confucianists had a positive attitude toward the traditional canons of values and virtues. These canons were, however, sifted and reoriented toward a new emphasis for ethics (loosely translated into humaneness). Through humaneness, the direct relationship with the other became one of the two complementary and fundamental dimensions of ethics. This relationship became cognitive in the golden rule 'I do not wish to be imposed upon by others, nor do I wish to impose upon others' or affectively in the sense of a spontaneous affection for others or sympathy. Anyone not encompassed by role-based relationships (father-son, ruler-subject, man-woman, old-young) is, thus, drawn into the realm of responsibility.

Just as Confucianist ethics are far more than mere role-based morality, the concept of Confucianist social and political order touches on far more than just hierarchy and difference. Instead, proper order has a dual nature. Although society without inequality is unthinkable, society can only function on the basis of reciprocity, with the 'shared utility' of a purposeful association, thus bringing advantages to all the participants and preventing differences from becoming a source of conflict. Confucianism primarily sought to ensure the redemption of the expectation of reciprocity not institutionally, as through law, but instead through the development of the decision-maker's personal decency and morality. The fixation on the individual, rather than the institution, left largely untouched the preexisting social structure of hierarchy, in particular monarchy, patriarchy, and the seniority principle.

Indeed, original Confucianism strove not for pious conformity to order but for the unity of social integration and individual integrity, as in the maxims 'be united, but not partisan', 'harmonize, but do not swim with the stream', and 'bend, but do not bow'. Although it emphasized the loyalty of the family and advocated loyalty to the ruler, Confucianism brought moral reservations on both. These reservations included the readiness to criticize and implied suspending conventional ties in order to act humanely, 'to follow the natural law rather than the ruler, justice rather than the father'.

The protagonist of early Confucianist ethics is the nobleman, not a social but a moral designation. The nobleman practices solidarity with society, but cannot expect social recognition and must be prepared for a life of poverty and asceticism. He is not to assimilate opportunistically. He is to absolve himself of the judgment of the 'many' and find, via self-cultivation, self-respect as the basis for independent action. With continuous self-reflection and inner examination he is to ensure the purity of his motives.

Coupled with this self-referentialism is the idea of autonomy, which resonates in every basic text of Confucianism. For Confucius, 'humaneness' can only 'emanate from the self', not 'from others'. This self-referentialism, however, does not typically lead to any separation from society. The Confucianist shall strive for personal perfection to position himself as a moral authority in the service of the whole. The result is the postulation of a primacy of morality in all aspects of public and private action. This pertains especially to the realm of politics, where Confucianist intellectuals, as state officials, assume the role of guardians. The ultimate superordination of moral authority over political authority theoretically implies that a bad ruler may be deposed and that tyrannicide is legitimate. Law must also derive from a moral source, not the arbitrariness of the ruler, but law is nonetheless accepted as the primary means of governing social relationships.[143]

The guidelines of morality of Confucianism underlie economics. Wealth is only legitimate if gained virtuously, and even

then it is not desirable. In principle, personal benefit is secondary to fairness. Later, a utilitarian strain of Confucianism attempted to rehabilitate the generally proscribed pursuit of private interests as compatible with common good. This line of thinking has, actually, drawn attention in the search for explanations for the modern East Asian economic boom. Indeed, economically efficient behavior is promoted by some of the virtues that Confucius advocated, and as such, the rapid economic advancement of East Asia can be traced to Confucianist values like industriousness, willingness to learn, cooperativeness, thrift, pragmatism, and corporatism. Also, Confucianism seems to be against any identity-forming and politically legitimizing functions, and, in this sense, it serves as a bulwark against the infiltration of unwanted foreign values.[144]

(e) Christianity

Development retains a broader space also in Christianity. Christians describe development in terms which go beyond conventional definitions of development as modernization and economic growth.[145] The papal encyclical *Populorum Progressio* (1967) claimed development as a new name for peace. A Christian Aid pamphlet published in 1970 states: "Development means growth towards wholeness: it describes the process by which individual persons and communities struggle to realize their full potential; physical and intellectual, cultural and spiritual, social and political." Thus, development is a Christian concern.[146]

Christianity actually has often been in favor of change. There have been challenges to the religious institutions of the establishment against perceived injustices. In the sixteenth century Europe, movements to reform the doctrines and institutions of the Christian church claimed the word of God in the scriptures as the supreme authority, thus challenging the priestly hierarchy. The Bible became accessible to peoples in their own languages and their own homes, and it continues to be a resource for Christians working for change today. The Jubilee 2000 Coalition, an international movement of churches and development agencies, for instance, in recent years,

based its messages about the cancellation of Third World debt on the Biblical imperative of justice for the poor. In Africa, Christians have sought an authentic, 'de-colonized' theology, while in Asia the focus has been on the struggle for human rights.[147]

(f) Islam

The Islamic vision of development also has its roots in Religion (*Deen*), and is heavily governed by Divine Law (*Shari'ah*), ethics, and morality (*akhlaq*). It is predicated upon the premise that human beings are created by God to fulfill a specific mission: to realize the two-fold role of the human person as the servant of God (*abdul'Lah*) and as His viceregent (*khalifah*) on Earth. Indeed, development in Islam is centered on the development of the human person to fulfill these two divinely ordained functions.

The developmental goals of Islam are anchored in the concepts of human well-being (*falah* and *sa'aadah* – also meaning success, happiness, prosperity, or felicity depending upon the context in which they appear) and good life (*hayatun tayyibah*) in this world and Hereafter. Human well-being and the good life are to be attained through the balanced satisfaction of both the material and spiritual needs of all human beings, for which a strong sense of human dignity, brotherhood, and socio-economic justice for all is critical.[148]

From the Islamic perspective, justice is 'universal' and human dignity is 'for all'. Concern for the poor, and assistance by the rich for the poor, is an important tenet of Islam. Hence the importance of *Zakat* (a system of divinely mandated alms that enjoins upon those who can afford to give a small portion of their wealth to the poor at least once a year), *Sadaqat* (the various charities), and *Awqaf* (pious endowments) enjoined by Islam.

Optimal and balanced human development requires right knowledge (*ilm*) and ethical action (*amal salih*). Right knowledge consists of both knowledge of the religion and knowledge for worldly advancement. It is a religious obligation for Muslims to fully immerse themselves in both forms of knowledge. Pursuit of knowledge such as in the sciences for economic and human development is therefore

obligatory in Islam, and is considered a form of worship of God, a way of knowing and becoming closer to Him provided the intention (*niyat*) is present. The striving for knowledge and economic advancement in this world is an important part of a Muslim's struggle (*jihad*). Effort exerted in this life is a bridge (or means) to well-being in the afterlife.

Ethical action includes action guided by knowledge and wisdom (*ilm* and *hikmah*), justice and fairness (*adl*), caring for the welfare of the poor and disadvantaged, moderation (*iffah*) and conduct worthy of the trust (*amanah*) vested in the human person. The principle of *tawhid* demands that there should be no exploitation among human beings, no domination of society by any one class, nor exclusion of the religious from the worldly, nor even discrimination based on linguistic, national, and ethnic considerations. Islam also enjoins high morality in the individual and society. These elements underline the importance of good governance in Islam. The well-being of the people, which is the aim of religion and the objective of the *Shari'ah*, will prevail when their faith, life, intellect, posterity, and property are safeguarded, and when there is complete justice, mercy, and wisdom pervading all areas of their public life. The ultimate end and central element of human development in Islam is the attainment of happiness (*falah*). At the highest level, happiness is a spiritual-intellectual and ethical state of the soul (*sa'aadah*).

In Islam, the fulfillment of human potentials is an important aspect of the good life (*hayatun tayyibah*). A healthy foundation for people's development prevails only when people enjoy a decent standard of living, and when opportunities to advance and prosper are sufficiently available.

Although apparently varying in form and in the process of evolution, the substantive ideas of development, change, and human rights defended by the various religious philosophies are pretty much similar. All, in one way or the other, consistently condemn oppression, and vouch for equity and progress through a just legal system for all humanity.

2. Marxian Theory of Justice

Marx did not develop a theory of justice per se, but approached it, in his discourses, in an implicit manner. Marx's discussions project that justice of transactions, institutions, and structures is to be determined primarily by the mode of production. Each mode of production has its peculiar characteristics: what may be considered in one mode may not be so in another. Marx rejects the abstract and universal generalization about justice and insists that ideas about justice are to be framed from a close and continual examination of the modes of production.[149]

The famous dictum "from each according to his ability, to each according to his need" can be considered the fountainhead of the Marxian theory of Justice. But the spirit of this dictum – that of distributive justice – can be realized only in a true communist society of Marx's dream. The dictum lays down the vision of a perfect society which will also be a just society.

Marxist doctrine considers that the essence of justice lies in economics. Being impregnated with materialistic view, it considers the positive law of a state as imposed on its members by the authority, the capitalist class controlling almost all the means of production. According to this interpretation, the expectation of the proletariat will be fulfilled only after a revolution takes place. For Marx, the prevailing system of justice is nothing more than a mask of capitalist exploitation. This exploitation, in turn, is the outcome of the capitalist system of production whose end is possible only after the destruction of the capitalist mode of production. For him, exchange arises from the necessity of economic relations. Because it is impossible for commodities to enter the market and strike out their own exchange, the economic necessities of exchange arise. The owners of the commodities must behave in such a way that each does not appropriate the commodity of the other and parts with his own, except by mutual consent.[150]

Marx perceived the danger that the dominant notion of justice of the capitalist mode in the name of just and fair distribution could

become diction, thereby preventing the very question of capitalist exploitation. Raising doubts about fair distribution, he asked, 'Do not the bourgeoisies assert that the present distribution is fair?' 'Do not the socialist sectarians possess the most varied notions about fair distribution?'[151]

Deeply concerned with the mode of production, Marx insists that the prevailing class interests are irreconcilable, and the concept of distributive justice in a capitalist society is irrelevant, if not dangerous. Law and political institutions are founded on this superstructure. Justice in capitalist society is based on the capitalist mode of production and capitalist relations to production, and as such has meaning and relevance only for those who own the means of production. Justice, in any form, in such a society, becomes injustice for the toiling masses. A real justice for the working class is possible only when all the means of production are collectivized and the exploiters are expropriated.[152]

3. Gandhi's Approach to Justice

(a) Indian Concept of Justice

The formulation of the doctrine of justice in the form currently understood in most countries of the world appears to be a result of the Western thinking. And the Western minds, failing to look into the mystery of justice as a whole, seem to have particularized it in different streams. It so happened, perhaps, because they tried to unravel the mystery through reason only, without realizing that reason alone is not sufficient to understand the concept in its fullest dimension, which is ingrained in the sum total of a human life.[153]

Therein enters the Indian concept of *Dharma*, which defines the term justice (*Nyaya*), taking the whole human life as one inseparable unit. Actually, justice is neither the root nor the fruit of Indian thought and culture (actually the term has no theological and metaphysical basis in Vedic literature), but a consistent and continual enquiry about truth and knowledge. *Dharma*, in all the three senses (justice, law, and duty), is the fundamental basis on

which a well ordered state rests. Truth, reason, impartiality, and duty are important from the point of view of knowledge of justice. Order, harmony, security, punishment, and prosperity are important from the point of view of actions in justice. And happiness, freedom, and welfare are important from the point of view of ethics. Thus justice must conform to the reality of human life. Kautilya, a noted philosopher of ancient India, saw in justice the basis of law and an instrument of maintaining social harmony and social order. For him justice was the discrimination of good from bad, right from wrong. Justice demanded that offenders or deviators from the path of righteousness be punished. But when awarded with greed or anger, that punishment could excite fury even among hermits and ascetics. Therefore it had to be just.

There is no doubt that a proper study about philosophers and thinkers is best carried out without reference to their personalities. But while studying Gandhi's approach to justice, it is impossible to ignore his personality and his achievements in life.[154] One has to take note of, at least, two points for a proper appreciation of his approach to justice. First, although Gandhi was a barrister and an insider to the profession of law, he was not a man of academics. He did not pen down his ideas in any consistent form and in one place. His ideas and views float through innumerable passages contained in his articles, statements, speeches, and correspondence. Actually, a noted scholar, J.B. Kripalani, rightly stated: "If ever there was a planner without elaborate blueprint, Gandhi was one."[155] It is also true that circumstances did not allow him to be rigid in his approach or to spin his theories in the cloistered environment of his study. Rather the responsibility bestowed upon him by his fellow countrymen in an alien land (South Africa) gave him ample opportunity to grow and evolve in the crucibles of experience.[156] In the study of his approach to justice, therefore, his struggle for equal treatment for his brethren and for himself cannot be ignored. The solutions he offered for alleviating the difficult conditions of his brethren in their fight for justice were not derived from any set principles; they were premised on necessity and

warranted by circumstances. Second, his genius was more spiritual and moral than intellectual; his life cast in the spiritual mold, of which truth and non-violence were the fundamental tenets.

At a very early stage Gandhi understood that being called to the bar was one thing but practicing law was another. His confessions "It was easy to be called [to the Bar], but it was difficult to practice law .... I had read with interest legal maxims but did not know how to apply them in my profession .... Besides, I had not the slightest idea of Hindu and Mohammedan law" speak volume.[157]

Initially, this frustrated him. But what inspired in spite of a lack of understanding and training for legal practice, and a lack of self-confidence were two important qualities: honesty and industry. One of his English friends, Fredrick Pincutt, advised Gandhi that acumen, memory, and ability were not essential for being a successful lawyer; honesty and industry were sufficient.[158]

(b) Religion-Based Justice

Historically, justice has been conceived in two different ways. First, as a supra-mundane eternal idea conceived to exist apart from man and his emanating from the higher sources, although man seeks to know his nature and draw inspiration from it in his actions. Second, as a temporal man-made social ideal dependent upon man in its inception and practice. The concepts have the difference of contemplation and actions, philosophical reflection and practical conduct. Gandhi, a trained barrister, who later claimed to be a farmer and a weaver, and an ardent follower of Hindu *Dharma* who believed more in the natural law rather than man-made law, assimilated both the concepts and endorsed justice as a man-made ideal to attain the supreme end of human life.

Justice is a dynamic concept beyond any general meaning applicable to any specific time. However, the quintessence of justice lies in giving each individual and group their due in any form, depending on the need, merit, and capacity of the individual and group. It has passed through a number of stages before arriving at the present refined notion of equal treatment of persons in equal or essentially similar circumstances.

Indeed, the Indian philosophy regards justice as a concept, which is part and parcel of the human life and day-to-day conduct of human being vis-à-vis others. Gandhi's definition of legal justice is the concept of the Indian tradition of *Dharma*, a conduct based on the duty of individuals, a duty inscribed in the welfare of the society, a law based on rationality with due regard to morality, and an approach which identifies human beings vis-à-vis each other. In Gandhi's view, man-made law must be derived from the needs of the society and hence a true law ought to reflect the higher principles of morality. For Gandhi, conscience was the means to gauge natural law and positive law. In this sense, his view was somewhat close to the view of ancient Greeks who believed in justice as a metaphysical principle, and who surrendered every result of their action to destiny. But the difference between Gandhi and the ancient Greeks is that Gandhi also relies on *Karma* (action) and argues that action is within the reach of a human being, which, and nothing else, decides the ultimate result.

Gandhi sees justice as truth, non-violence, end of all exploitations, and impartial performance of duty. The theory of *Karma*, the theory of ends and means, the faith in one's duty and performing it with full sense of dedication, the voluntary obedience to the positive law to an extent where it does not interfere with the conscience of a person, and equality before the positive law are all tenets of his philosophy.

(c) Law-Making and Enforcement

Although Gandhi considered natural law as supreme, he advocated obedience to man-made law. Positive law, which essentially aims at protecting society, whether good or bad, must be respected. If this law, which is evolved through customs, usages, or conventions prevalent in the society at any given time, does not fall in consonance with one's conscience, it fosters untruth. Here exists some space for reason (or *viveK*) or rationality based on morality (in law-making).

Gandhi was in favor of constantly identifying problems in society, creating awareness amongst people, justifying a claim to right, and then claiming such rights from the government through constitutional modalities and remedies. However, the possibility of compromise at all stages, and that of civil disobedience *(Satyagraha)* in extreme case, was always kept open. The principal idea in Gandhi's approach is that law should be socially just; otherwise, it should suffer civil disobedience. He initially casts a duty on all to obey the law framed by the legislature. But if and when the individuals or groups of individuals see that the law passed is an instrument of injustice, is not serving the higher ends of morality, and is repugnant to their conscience, then the remedies within the constitutional framework need to be resorted to. After exhausting the constitutional remedies, and if their plights are still ignored by the framers, such individuals or groups of individuals may shift to civil disobedience *(Satyagraha)*. But, in this whole process, for Gandhi, there is not even an iota of ill-will, violence, or hatred against the persons acting as an instrumentality of the state. The idea, here, is to disobey the law, suffer the penalty willingly and voluntarily without embarrassing the authorities, and appealing to the inner voice of the framers of the law to review the injustice caused by the legislation. Having dug deep into the oceanic reservoir of Indian culture and world heritage, for Gandhi, Daniel's disregard for Law, Socrates' preaching of truth, Prahlad's disregard for the orders of his father, or Mirabai's conduct, all could be regarded as *Satyagraha* in its pure form. Thus in his moral jurisprudence, the rule of law is not without peril to its own life, if it robs the inalienable liberties and conditions of survival of a human being. The purpose of law is to secure justice, but where this law supported by the majority becomes repugnant or reactionary, the dissenting minority may seek its repeal or amendment, initially through the constitutional remedies available to them, or through civil disobedience otherwise. His approach was to make the framers of law realize the injustice caused by their legislative measures. He supported the use of 'soul force' and

sacrifice of 'self' as a method of securing rights with strict adherence to the principles of truth and non-violence.

Against the idea of compartmentalizing justice, Gandhi took it as a 'whole virtue' governing every aspect of life, ingrained in 'self-conscience' and expressed in the form of love toward humanity and nature's gifts. In Gandhi's moral jurisprudence, law and conscience, law and humanism, and law and religion did not belong to watertight compartments of human life; rather they overlapped.

Gandhi's approach to legal justice is distinctly noticeable in the following three situations:

1. When the government is on one side (by passing discriminatory law) and the individual or group of individuals is on the other side opposing the same.
2. When the law itself is not discriminatory, but there is a difference between two or more individuals and a group of individuals within that framework.
3. When there is a dealing between the officer of the court (lawyer) and the client (common man).

(d) Decentralized Justice

Although the burden to perform judicial function, in modern polity, lies on the state, Gandhi was not much in its favor. He felt that it was an expensive bureaucratic procedure, which led to unnecessary delays. It also failed to treat human beings with dignity, as it considered them only as litigants. Hence he advocated decentralization, and for all judicial work to be performed by the village panchayats.

Indeed, he favored a complete decentralization of economic and political powers which would be instrumental in creating a self-reliant and self-governing village community *(Swadeshi)*. *Swadeshi* is crucial for inter-relating and inter-mixing the different scenarios of life in its entirety. It means creating such conditions within its own jurisdictions, which are essential for creating order. In this scheme of things, the country will have an organizational state of well-knit, well-coordinated, and cooperating village communities

involving direct participation of the individuals and creating an order based on justice and love of mankind.

(e) Conscience, Crime, and Punishment

Gandhi constantly laid emphasis on the lawyer's duty toward the client, to the court, and to his conscience. He considered the duty to conscience as supreme which overrode the other two. Circumstances did not necessarily matter. Gandhi criticized the lawyers charging exorbitant fees and misguiding the clients to resort to litigation in order to make personal gains. He questioned the basis on which lawyers charged fees higher than that of a laborer for his honest day's work. On the other hand, when the client was morally wrong, Gandhi refused to defend him on account of the legal lacunas; rather he advised his client to admit the mistake and correct it. Due to his faith in the fundamental principles of truth and non-violence, he was against the practice of defending a client at any cost or succumbing to the prevalent tout system. Truth was indispensable if lawyers were to perform their functions in society, with regard to the court, to the client, and to themselves in order to attain justice. For Gandhi, justice was not confined to what lies within the ambit of a legal framework, but also extended to truth and morality. For him, justice was an inquiry into truth by applying lawful and moral means to find out what is due to whom and who is entitled to what within an established framework when the framework itself is not faulty or discriminatory. The advice Gandhi provided to Parsi Rustomji, in his famous case, was a glaring example.[159]

Gandhi insisted on the protection of the peace-loving majority and favored punishment only for protecting the society and reforming the wrongdoer. He viewed criminals as constituents of the degenerated section of society whose behavior is subject to correction, and regarded crime as a curable disease. Rejecting the retributive and deterrent theories of punishment, and advocating universal identity of moral actions, Gandhi favored a human touch in the award of punishment. In his opinion, every individual is

basically good and it is the environment of society which takes him to crime. For him, society has no right to punish those who oppose it through non-violent means. Gandhi categorized the criminals into political and non-political. He regarded political criminals as friends of the state and non-political criminals as misanthropes. The political criminals deserved forgiveness whereas non-political ones deserved reformation. Hence, he was in favor of changing the nature of punishment from being punitive to reformative. He wanted to take out the content of violence and argued that the purpose of punishing a criminal was to reinstate him in the society as its useful member. Moreover, he vouched for abolishing jails as punitive homes and converting them into hospitals, where every criminal would be a patient getting treatment for his psychological illness. The jailers would be like doctors who treated the various patients according to their symptoms.

Gandhi was not in favor of abolishing punishment altogether, only in changing its nature by withdrawing its violent element. He very well supported infliction of punishment by way of penalty and fines, but was clearly against death penalty. He viewed that since a man has no power to create life, he has no right to take it either. Also, every human being has a right to mend his ways, which cannot be denied by shortening his life.

Gandhi's approach to justice emphasizing the creation of a non-violent society based on human values and moral standards, with equal opportunities, economic equality and on trusteeship with the concept of *Swadeshi* where there would be no crime and hence no debate about the quantum of punishment, remains powerful, but although seemingly relevant and attractive, it is very difficult, if not impossible, to implement.

4. Rawls's Theory of Justice

The onset of the twentieth century brought with it an unprecedented struggle by people around the world for political and economic self-determination and guarantee of basic human freedoms. The desire for economic growth and national autonomy

raised serious challenges to maintenance of the rule of law and justice, often sacrificed by those seeking power and personal gain, foremost among which is the realpolitik school of thought, epitomized by Dr. Henry Kissinger. In that century, the international community attempted to develop understanding of what political justice requires of states and individuals. Philosophical theories of justice have played a large role in advancing this understanding. John Rawls's *A Theory of Justice* argued that justice is best understood by thinking about what rational adults would choose if they were ignorant of their own place in the resulting society: their class, their race, their sex, their religion.[160] Rawls believed that they would choose a structure that provides for all citizens a very extensive menu of basic liberties and opportunities, giving them priority over other concerns. In addition, they would distribute income and wealth in such a way that any inequalities are to the advantage of the worst off. Rawls's approach has not gone unchallenged, but it greatly clarifies our debate on the theme of justice. He made vivid in political form the deep moral idea that each person should be treated as an end and not as a means (as has also been seen in the earlier paragraphs on the religious antecedents). This meant that nobody's life chances, in the basic matters of liberty, opportunity, and well-being, should be pervasively determined by accidents of wealth or race or class, or sex.[161] Rawls put forward a position that he labeled 'the difference principle' and defined it as the 'strongly egalitarian conception...', that unless there is a distribution that makes both persons better off, an equal distribution is to be preferred.[162]

But, confronted with the sacrosanctity of the notion of state sovereignty, Rawls stopped short at the boundaries of the nation.[163] Even though it seems natural to think that the difference between being born in the United States and being born in Bangladesh is just as arbitrary, just as unworthy to be the basis for a human being's lot in life as race or sex or religion, Rawls's idea of forming a just society took the nation-state as its basic unit, unlike the religions. Insofar as Rawls and other theorists did approach the question of international justice, it was typically in a way that presupposed the

salience of the nation-state and guaranteed that unit considerable autonomy.[164] By default, it also focused on the parables of sovereignty and territorial integrity of states, the notion of *Panchasheel* and so forth. The result is that in philosophy, as in international law, only a semi-articulated set of universal norms protecting some aspects of human life across national boundary lines was developed. Torture, genocide, and even racial apartheid have become occasions for intervention into the internal affairs of a nation. Rawls went slightly further to extend the demands of international law to aspects of sex equality and other basic issues of personal liberty. But few philosophers have had anything at all to say about the egregious material inequalities among nations and the radical ways and means to bring equity. International law has been equally silent on obligations of material aid across national boundaries.[165] Although such aids in different forms and formats have been occasionally delivered across national boundaries, a real set of rules applicable to such situation has not been developed for all situations. Oftentimes, international inter-governmental organizations and national and international non-governmental organizations use their own rationale and *modus operandi* to intervene in such situation, and many international organizations have established their own framework or common procedures, but a law applicable to all types of actors - suppliers as well as recipients - is not yet in the horizon. The interpretation emanating from the array of customary international law is resorted to for intervening in such sectors. The *erga omnes* of international communities has hardly been elaborate and courageously debated.

5. Demand for Adaptability

Justice clearly requires more. International jurists give lip service to the idea that respect for human dignity is a fundamental moral requirement, while the international community daily allows human dignity to be violated by poverty, illiteracy, unequal liberty, and other nation-based inequalities. These jurists have difficulty acknowledging that we belong not only to the community of our

birth but also to the human community as a whole, and that we have obligations of some sort to that community. Because clearly identifying those obligations is difficult, these jurists find it easier to lapse into inattention. As such, enough thinking has not been done by scholars and jurists to understand the real choices of human beings that would have made it more difficult for them to ignore their obligations.[166] Therefore, philosophical theories of global justice are badly needed to give guidance to personal reflection and public policy.[167] These theories will need to do hard philosophical work that has not been done before: to articulate accounts of the relationship between personal and institutional responsibility; to think about what is owed a nation that has been despoiled of resources by others in the past; to think how far and in what ways other nations ought to help nations that manage their internal affairs badly.[168] They will have to face the thorny question of intervention or the notion of pre-emptive strike or pre-emptive self-defense, as recently reintroduced in the nomenclature of public international law (not surprisingly introduced by a few of the countries belonging to the 'elite' group).

Common sense would dictate that since at least some governments of poor nations are accountable to their people, and since there is no transnational government in prospect that is likely to be adequately accountable, it is difficult to endorse the idea that one society can influence the internal affairs of another society, whether by governmental pressure or by material aid.[169] But a theory based on ideology and morality is much at distance from the real practice, wherein most imperialistic objectives start with economic packages, creation of demands, and proliferation of supplies, and then enslavement of such nation. It is no wonder that England went to India through the route of the East India Company. The causal relation of economic expansionism with political imperialism thus becomes even clear and worse. The unfortunate dilemma is that the problem of real justice in the countries largely stems from the fact that most countries have long spans of colonial rules, streams of foreign invasions, and battles fought in the interest of colonists. Such events in history have put long and deep-rooted imprints of

foreign cultures, language, political domination, and patriarchal social structures oftentimes with the elite representing an in-between (go-between) force, always prone to compromise essentially for the sake of preserving their own margin of power. In such a situation, the local ethos is only but systematically and recurrently sidelined.

Today's justice, as designed by the intellectuals mostly bred with monopolistic idealism and power interest, and a few states and corporations swamped with the demand for growth, stands on the crossroads of multiple threats of economic and political imbalances. Uncontrollable law and order situation and denial of basic human rights are commonplace. As a consequence, the absence of any viable political and social fronts rooted in the masses, as also the unaccountability of the international community has created an ever-widening gap of trust, inviting religious, economic, political, and social fundamentalism to monopolize the future direction of the world, expunging state sovereignty and equality amongst nations as the main subjects of international law. A small minority, adhering to the philosophy of control disguised under the cover of security interests has taken successive measures to control all the countries and international organizations and impose strict regulatory and controlling laws, thus discouraging all independent state action toward defending the 'sacred' aspects of the members of society.

Tragically, law has not always been a guarantor of justice. Rather, it has systematically been conceived as an instrument to create a general pattern of behavior amongst the different actors in society, who, by virtue of being domiciled therein, are compelled to adhere to and abide by the norms. Most such actors are neither consulted, nor do they participate in, in any manner, in the formulation of norms, oftentimes detrimental to their own freedom and their values. Norms *per se* are not antinomic to justice, but norm-making in the current international system has rarely been a flawless or just process. In the attempt to impart justice, norms promote injustice and in the name of change of behavior, they corrupt morality. As such, they are anti-change, and hence, also anti-development.

In such a confusing situation, even reference to the respect for rule of law becomes meaningless.[170] Making decisions on the basis of laws that exist, which is the focus of the notion of the rule of law, becomes the last choice, as the laws to be enforced in a society/community are not made by the subjects of such laws. Such laws lack ownership and hence legitimacy. Often resulting from invasion (political, military, or economic), war, or other forms of political violence and aggression, if not outright corruption, laws have been not made but imposed by one group. Since the lawmakers have purposefully designed the laws to serve their own interests, they fail to take into account the local 'sacred' aspect in the change they intend to introduce, albeit oftentimes with naiveté and perhaps without malevolence. In such situations, therefore, difficulties arise not only in the enforcement of such laws, but abiding by them becomes an anachronism for the subjects and swearing in the rule of law becomes the last of their priorities. Indeed, rules imposed upon are difficult to be implemented, because they are difficult to be respected. The challenge then arises in assessing the level of participation needed for a country/society to be able to bring about changes through law, as the prediction of acceptability of the law is difficult, if not impossible.

6. Remedial Parallels

Law alone, and by itself, is not enough to protect the rights of individuals and countries. Unless effective remedies are conceived, remedies which are compatible with societal behavior and overall ethos of the society concerned, even the best of laws will risk failure. Examples abound in this context. One example in the area of family law may be worth noting. Some activists in the 1960s, imbued with neo-social modernity, went to the rural areas of a country to defend the rights of women who allegedly were being battered by their husbands. In an effort to solve their family problem, the activists recommended such women to obtain divorce, as that type of action was commonplace, relatively institutionalized, compatible with the religion, and successful in the societies the activists originated from.

The enticement promoted through attractive offer of freedom for women was, however, not accompanied with adequate remedies compatible with the societal and religious behavior. The result, then, was that those women quickly obtained divorce but were more miserable than before as the society therein did not provide any mechanism (economic, social, or psychological) to protect them in such circumstances and to facilitate their newly acquired status in life, in other words, to empower them.

Another example, a contribution of the logging industries, also emphasizes the risks resulting from the consequence of disrespecting local behaviors and transplanting laws. In the past, thanks to the rules of morality and religious edicts, traditions had developed in societies to respect trees, thereby promoting conservation. As such, the sustainable use of timber resources was ensured through religious canons. The logging industries, in the seventies, in the name of increased growth and private sector development, lobbied for legislation, which brought sweeping changes, particularly disturbing and breaking the nature-human consumption equilibrium maintained traditionally. This not only resulted in increased felling of trees but also led to environmentally disastrous consequences in the country, as the population was only trained to sustain trees with the lingua of traditional methods (mostly rituals). The new law, focusing on increased production, having failed to give due consideration to the sacred aspect of the population behavior and ethics, also failed to provide adequate remedies, thus failing to empower, although the intention may very well have been there. Such a change therefore did not bring about any positive outcome but neglected the local aspirations, and denied justice for the people.[171]

The above examples are indicative of the lack of effective and efficient management of changes in societies. However, not all examples are condemnable. Some efforts of international communities (particularly, the international financial institutions) have proven to be useful in empowering people. One example worth citing is the proliferation of user groups in many developing countries in the context of water resources or community forest

management and several other forms of community-driven development. The approach taken by the international community in the formation of such user groups (mostly with a specific legal instrument) and their decision to bestow such groups with the responsibility of identifying, conceiving, and managing all projects did not only add value in the implementation of such projects, but became clearly a substantial tool for empowerment of such people, thus becoming an element providing justice.[172]

Clearly the success of a decision (or a law) remains often contingent upon the willing participation of those who ultimately will be required to abide by it. In the same vein, any decision to shape the development of specific beneficiaries, to be successful, needs to be made by the ultimate beneficiaries themselves. This is what is commonly referred to as the rights-based approach to development. The challenge in this approach lies in devising a *modus operandi* to ensure adequate representation, a matter which is perhaps more easily treated in the realm of political science than in law.

PART 4

THE ALTERNATIVE

VIII

RIGHTS-BASED SUSTAINABLE DEVELOPMENT AND LAW

As noted already, the currently prevailing framework for development presupposes the ideas of capital markets, nation-state structures, free individual, and the rectilinear and unlimited process of growth. These ideas are justified and upheld by most of Western liberal philosophy. Embedded in this philosophy is the idea of freedom defined as the ability to make choices. The act of choosing is meant to affirm individual identity and self-worth. However, what is currently happening in most countries of the 'developing world' is not the ideal of free individual enjoying material prosperity amidst democratic government, but a warped version of this ideal that serves to benefit those in the industrial world. In the so-called developing world income and material disparities are increasing, feudal cronyism is disguised as representative democracy, and a mass of powerless citizens are increasingly cut off from their historical identities. Yet, these powerless masses have internalized the imported notion of freedom. Despite experiencing suffering and breakdown of communities in the name of industrialization, the desire to consume more is becoming the driving force for most of the society. In contrast with their heritage, identity is no longer interconnected with family, village, and community but instead with money and consumer goods.

1. Focus on Human Existence

Notwithstanding this inherently contradictory perspective and in a situation of *fait accompli,* it should be noted at the outset that the right to development has, by and large, acquired the status of an internationally recognized human right.[173] Scholars have emphasized

that all fundamental rights and freedoms are necessarily linked to the right of existence, to higher living standard, and therefore to development.[174] Also, the classification by scholars of the right to development as the 'third generation human right' in the early eighties, has further clarified the debate.[175] Clearly, international human rights law is one area of international law, which focuses quite explicitly on concerns of justice and human dignity.[176] It thus plays a vital role in identifying and addressing the inequalities that globalization, powerfully promoted by international economic law, appears to generate.[177]

It is true that no nation on earth can really give its citizens absolute legal justice, on one hand, or absolute protection against poverty and ignorance, on the other.[178] It is in this context that the rights-based development approach gains prominence. The approach is more important for countries that suffer from the problems of both rights and development simultaneously. Nonetheless, although extensively debated, the rights-based approach is still inadequately understood, and the positive outcome and effects on countries and societies have been minimal, particularly due to difference in its understanding.

Extracted from the framework of the values, standards, and principles enshrined in the UN Charter, the Universal Declaration of Human Rights, constitutions, and relevant laws, a rights-based approach to development attempts to provide, for a country, both a vision of development and a nationally tailor-made set of tools to achieve it. A rights-based approach is not only about expanding people's choices of material needs and capabilities to execute an activity but also about the empowerment of people deciding the nature and process of development. It not only attempts to define the subjects of development, but also to translate people's needs into rights, recognizing *human persona* as an active subject and a claim-holder. In addition, it identifies the duties and obligations of those against whom a claim can be brought, and regards both the process and the outcome of development interventions as equally important. The most elementary process in pursuing rights-based development

strategies depends on the determination, acceptance, and operationalization of the interrelated aspects of duty-bearers (states) and claim-holders (subjects) within a system of accepted universal values, principles, and standards – the key attributes for addressing power relations in development. Therefore, adopting a rights-based approach not only engenders change in the elements and variables of development, but also in the traditional thinking process of designing the institutions for development.[179]

2. Focus on Human Dignity

Putting the *dignity and worth* of 'human persona' at the center of the development process means transforming the existing basic needs and poverty strategies (which are based on the notion of benevolence) into claim-holders' rights (which are based on the universal human rights framework). Whilst a basic needs strategy includes an element of compassion and generosity, a rights-based approach focuses on the capacity of duty-bearers to fulfill their obligations and the ability of the rights-holders to claim their rights, thus introducing an important element of accountability, which in most development strategies is far from being adequately addressed. The principles that are of particular relevance for a rights-based approach to development include universality, equality, justice, participation, transparency, and accountability. Every man, woman, and child is entitled to enjoy her or his rights merely by virtue of being a human. All human rights - whether civil, cultural, economic, political or social - are to be treated with the same priority.[180] The government of a country has the primary responsibility to create an environment in which all citizens can enjoy all human rights, as well as an obligation to ensure that the respect for human rights norms and principles is integrated into all levels of governance. In this context, accountability needs to be viewed in the light of justice, and the principle of the Rule of Law needs to include resolution of competing claims, access to justice, redress for abuse of human rights, and provision for just distribution of public resources, and benefits and burdens of particular policies. This new approach focuses on

rights while launching development initiatives aimed at ensuring that the distribution of the fruits of development is just, even, and equal amongst all the people and all the countries. Also, it relies essentially on humanitarian concern, wherein all the marginalized communities (or countries) are brought into the mainstream of development.

As referred to earlier, rather than by simply taking people as mere beneficiaries, the rights-based approach places human dignity at the center while addressing the development concerns. The development efforts therefore should not undermine the value that a human being carries by virtue of being a person. This approach then would be not only extensively participatory but also based on the principle that equitable development is an entitlement for all. This approach, in which the process is as important as the outcome, reserves for the stakeholders the right to participate in finding solutions to their problems. The issues can be related to anything: construction of big dams, multinational corporations, international investment, trade regimes, free market, or globalization in general, which may affect the socio-economic life and status of a population at large. That is the *locus standi* for people's participation. For instance, the concerns raised, in the 1990s, by the *Save Narmada* campaign in India[181] as well as the *Save Arun* campaign in Nepal[182] provide interesting and successful examples of stakeholders' participation, that big dams may be necessary, but construction should not destroy people and their culture and heritage. In contrast, the way the compensation of victims by Union Carbide in the Bhopal incident in India was managed shows a sheer lack of concern for stakeholders, in addition to raising serious doubts about the international equity regarding tortious obligations of large corporations.[183]

3. Focus on Accountability

In spite of some successes and some failures, the rights-based approach to development is not free from challenges. It is critically dependent on oversight bodies (such as national human rights

commissions), accountability mechanisms (such as parliaments), or remedial institutions (such as independent judiciaries). Also critical are political systems which are inclusive and participatory, along with appropriate law-making mechanisms, which not only fit in the economic and political nomenclature of the country (or society) but also mirror the moral values prevailing in the society. The success, here, is more likely when the approach becomes holistic.

The rights approach to development, therefore, requires us to re-examine the ends and means of development. If improvement in the well-being of people based on enjoyment of rights and freedoms is the objective of development, economic growth consisting of the accumulation of wealth and gross national product would not necessarily be an end in itself, as it has tended to be so far. It can be one of the ends, and can also be a means to some other ends, when 'well-being' is equivalent to the realization of human rights.[184] Indeed, as Nobel Laureate Amartya Sen would have put it, a prosperous community of slaves sans civil and political rights cannot be regarded as a community with well-being.[185]

PART 5

METHOD

IX

REFORMING THE SYSTEM

In order to create an acceptable and functional equilibrium amongst all the actors in the world, weak or strong, rich or poor, large or small, the entire international system obviously needs reforms. These reforms should be both at national (domestic law) and international (international law) levels. Also, whilst emphasizing the end result of reforms is critical, devising a consensus-based process to undertaking such reforms is equally important.

1. Level of Domestic Law

Improving the international system through reforms in the domestic legal framework purports to make national systems more democratic, inclusive, and participatory, leading to substantial consensus building in decision-making.

(a) Development through Participatory Democracy

Several studies dealing with the sustainability approach as a basis for improving the livelihoods of the poor people and poor countries have revealed that, generally for development to be sustainable, the rights related to natural, physical, human, financial, social, and political capital must be protected.[186] It is not necessary for this study to further elaborate on the long list of such rights, which are generally a part of the constitutional law or other organic laws of many countries often in the guise of fundamental rights.[187] Rather, this study tries to emphasize that in view of the discriminatory and non-egalitarian nature of the current international system, ensuring such right is not always feasible. For such rights to be guaranteed, the perspective, the approach, and the process related to the making

of the system need to be revisited. The overall approach should be to make it more participatory and democratic, however difficult it may be.

From the standpoint of development, of all the elements of governance, democracy is perhaps the most controversial, in the sense that there are a number of full-fledged democracies in the world with very low levels of economic development (material, physical, infrastructural), just as there are many countries with high levels of economic development, which are not democratic at all.[188] Democracy, in the currently and generally understood sense, does not necessarily engender development. The relation between democracy and economic growth is also problematic, as is the connection between economic globalization and protection of social and economic rights.[189] Actually democracy, like growth, is filled with tensions and contradictions, and requires its actors to labor diligently to make it work. It is not designed for efficiency, but for accountability.[190] It is never a finished product; it is always evolving.[191] A democratic government may not be able to act as quickly as a dictatorship, but nevertheless, once committed to a course of action, it has the potentiality of drawing upon deep wellsprings of popular support. As noted by a scholar, "democracy, with its pluralistic flexibility and its imperative for productively sustaining diverse interests, is the best political foundation for adaptability in societies open to change."[192] Also, like John Rawls's, our assumption is that a state of near justice requires a democratic regime.[193] This is why, from a right-based development viewpoint wherein participatory law-making is critical, it becomes a very relevant element. 'Participatory', in this case, also refers to participation in deciding about self-determination, autonomy, culture, land, religion, adequate livelihood, suitable environment, and most importantly, living in an environment of rule of law, which is one of the pillars of democratic governance, the most difficult to achieve and to gauge. This is specifically so because, although a certain harmonization of different aspects of the rule of law can be achieved through the interpretation and application of

international standards, the degree of its implementation depends also on the specific social and political features of the state in question.[194]

(b) Democratic Law-Making

History records that formal laws have been made by people for five millennia, but the methods different societies have used to make the rules under which they live have varied enormously, from edicts by divine kings to majority vote at village meetings. But at all these levels, a large input from the citizenry, either directly or indirectly, is always secured. Law-making bodies recognize that they are responsible to their constituents, and if they fail to legislate in the people's best interests, they will face questions and even removal from their position. The key to democratic law-making is not the mechanism or even the forum in which it takes place, but as noted already, the sense of accountability vis-à-vis the citizenry and the need to recognize the wishes of the people. Some scholars, in that respect, emphatically note that the social basis of democracy should be the transformation of social structure and an added sense of individuality and personal freedom.[195]

Oliver Wendell Holmes, Jr., in the nineteenth century, noted that "the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient, but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."[196] Consequently, it becomes imperative to look at the origins of legal traditions, and the everyday law-making process as part of an historical process. For instance, when British colonists in colonial America put into practice the law-making heritage that they brought with them, they made certain alterations to suit their new environment.[197] Such alterations were meant to ensure greater acceptability of the new law, particularly because introducing totally new phenomena in a society generally needs to be subjected to conformity-test, requires serious preparatory work, and takes a long time to implement. As such, therefore, concluding that 'a society

where Islamic law has prevailed for centuries will not be easily amenable to the philosophy and principles of Hindu Law' will not be incorrect. Inversely, it would also not be an error to conclude that the 'principles of Islamic Law will not necessarily fit in a country of Hindu Law tradition'.[198]

However complex and varied the scenario may be, the purpose of law, in light of both the beneficiaries' holding of claims as well as the enforcers' ability to effectively ensure compliance, remains the most crucial element for consideration. Indeed, Robert Cover's statement that "we inhabit a *nomos* – a normative universe" is no less relevant for transnational space than it is for the domestic one.[199]

(c) Morality-Based Law

Law's autonomy from politics depends on the possibility of purposive 'normativeness'. Moral autonomy, however, is more a basic claim about the objective value of law's normative premises. As western societies shed belief in both objective value and self-legitimizing power, acceptable social hierarchies and institutions were driven by the divorce of private morals and public needs to found the liberal state upon a rule of law which posited the possibility of rationality apart from subjective morality to sustain and relegitimize power relationships.

Actually, the rule of law was born to contrast with moral indeterminacy. The separation of law and morals gives meaning to the rule of law only when the problem of indeterminacy can be solved. This jurisprudential task is rendered impossible by a double paradox within the rule of law. First, only obfuscation disguises law's inability to resolve the conflicts over the ideal, which gave it birth. The problem of indeterminacy then is replayed within the rule of law. Second, a Liberal State, premised on the need to legitimize power relationships, finds itself caught between its foundation and its objective. Because the problem of indeterminacy is not resolved by the rule of law, a Liberal State is unable to resolve the problem of power legitimation without undermining itself by defeating the premise of objective value. Although their merger will

have a profound impact on our collective social vision, the difference between law and morals cannot be maintained.

Despite the almost universal rejection of pure mechanical formalism, it must be the starting point for any review of the claim that law is autonomous from morals. To begin with, it is not to encourage tilting at strawmen, for the failure of formalism to sustain the separation of law and morals and thereby to solve the problems of indeterminacy and legitimation; it is replayed in the corresponding failure of theories, principles, and policies. Formalism contrasts facts with values, objectivity with subjectivity, and ultimately law with morals precisely to permit a determinacy in the legal order which became unavailable in ethics with the disappearance of consensual faith in objective moral truth.[200] Roscoe Pound described this attempt to fabricate determinacy by separating law and morals as a stable solution to the problem of power legitimation. His linkage of indeterminacy with the insecurity of the Liberal State reiterates the nexus alluded to by Rawls, which underlies the double 'meaning' thereby maintaining a paradox.[201]

Whether laws are rules, customary behavior patterns, or feelings of interactive obligation, the rule of law is a specific communal response to the problem of social indeterminacy. It permits social stability by obfuscating the conflicts between custom and discretion, real and ideal, particular and universal.[202] This stability is purchased by a social preclusion of progress beyond the stability of routinized contradiction. Law does not solve the contradictions, which motivated it. Rather it imprisons us within them. Such imprisonment may indeed be preferable to the chaos of social confrontation with the disharmonies within us, whatever the eventual benefits of breakthrough to a communal order. Law, however, prevents us from confronting that trade-off openly by denying society a transformative vision.

In reality, no view of law has successfully resolved the problem of social innovation (development). Willed change remains a mirage. Jurisprudence, from early formalism to modern Dworkinian legal theory, fails to disguise the disharmonies within law. The rule of

law has shielded us from the puzzle within us between the need and fear of others. Our legal constructs have obfuscated the conflicts, which divide us internally and from each other. They have protected us from the disillusioned anguish of facing moral indeterminacy. In the process, however, they have imprisoned us (individually and collectively) in a pattern of arbitrary social hierarchies, which seem frozen, yet legitimate.

If it is true that the rule of law was meant to provide legitimacy through its autonomy from subjective morality or arbitrary power, it should seem disturbing that our normative inquiry has returned us to policy arguments about morality and social or economic engineering. It should not be surprising that judicial inquiry into these areas should not produce killer arguments, which could control outcomes. Arguments about economics contrast visions of growth and utility maximization with spiritual peace. Ideas of quantity battle with preferences for equal distribution. Most critically, the strategies focusing on sharing and trust compete with those based on the invisible hand of individual competition and consumption in discussion of either altruistic or individualist economic goals. There seems neither consensus nor revelation as to the more efficacious strategy. If judges seek norms in economic discourse they will find only the chaos of indeterminate polarized arguments. Their reliance on it replaces the fortuity of legislative interest group representation with the whimsical choice of argumentative fragments by judges. Arguments about social engineering share this indeterminacy. The opposition of ideals of paternalism and self-determination is more familiar in private than in public law. In private law, the conflict of individualist and communal strategies of paternal intervention or justification for governmental abstention is familiar; in public law, it is not necessarily justifiable. Whatever the approach, laws have a tendency of being successful when they mirror morality.[203]

(d) Holistic Constitutionalism

The idea that governments derive legitimacy from the consent of the governed (a notion inherent to modern democracy) has ancient

origins in Greek and Roman history, and early modern European political theorists have added substantially to the concept of sovereignty as residing in the people. American colonists of the Revolutionary War era advanced this concept by increasing the rights specifically reserved to the people and further limiting government's reach. To prevent governments from trampling on rights by exceeding the power delegated to them by the sovereign people, the constitution created systems of internal checks and balances within a separation of law-making powers.[204] Each branch of government would have independence in the law-making scheme, but these powers would overlap, thus constraining institutional reach within a system providing for broad popular participation. The constitutional three-wheeler comprising the Legislature, the Executive, and the Judiciary cannot reach its constitutional objective or goal if one of them wobbles, a point Georges Bidault confirmed in his famous saying: "The good or bad fortune of a nation depends on three factors: its Constitution, the way the Constitution is made to work, and the respect it inspires."

It may be appropriate to recall, here, that constitutional government, rooted in liberal political ideas, originated in Western Europe and the United States as a defense of the individual's right to life and property, and to freedom of religion and speech.[205] In order to secure these rights, constitutional architects emphasized checks on the power of each branch of government, equality under the law, impartial courts, and separation of the Church and the State. Poet John Milton, jurists Edward Coke and William Blackstone, statesmen Thomas Jefferson and James Madison, and philosophers Thomas Hobbes, John Locke, Adam Smith, Montesquieu, and John Stuart Mill, all have unequivocally emphasized this.

In more precise and clearer terms, John Locke observed that "Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it."[206] Constitutionalism or rule of law means that the power of leaders and government bodies is limited,

and that these limits can be enforced through established procedures. As a body of political or legal doctrine, it refers to a government that is devoted both to the good of the entire community and to the preservation of the rights of individual persons.[207] Under constitutional theory, government must be just and reasonable, not only from the viewpoint of majority sentiment but also in conformity with a higher law, which is the constitution. Rule of law suggests an appeal to a higher standard of law and justice -- transcendent and universally understood -- than the merely mortal or the enacted law of contemporary politicians. The rule of law, the lifeblood of political and social order and basic civil liberties, suggests that if our relationships with each other (and with the state) are governed by a set of relatively impartial rules -- rather than by a group of individuals -- then we are less likely to become the victims of arbitrary or authoritarian rule. The political obligation implied by the rule of law applies not only to the rights and liberties of subjects and citizens but also with equal claim to rulers and governors.

Law-making, therefore, must take place within certain parameters. There must be approved methods for laws to be made and to be changed. In particular, the basic framework of a constitution, which is not only a law but also an organic document of a government, laying out the powers of the different branches as well as the limits on governmental authority, cannot easily be changed because of the wishes of the transient majority. It requires the consent of the governed expressed in a clear and unambiguous manner, the key feature of constitutionalism. The separation of powers claim is opposed by broader notions of law parallel to this argument, which focus on the inescapability of judicial review. The municipality strand is opposed by a communal vision of decentralized international decision-making and the inseparability of municipal and international law. This loose organization has not explored the reversibility of the arguments either linguistically or structurally. For example, arguments to restrain municipal courts could be based as well in the fear of particularism from an

international perspective as in the domestic fears of world community interference with sovereignty.

The basic principles of ensuring democratically created law (thus a situation of 'near justice') include consent of the governed, involvement of people at all levels of law-making, open access to the process of law-making whether through voting, petitioning, or filing lawsuits, or through judicial review of statutes, administrative rules and regulations, executive office actions, and reliance on fundamental principles of government. Through democratic law-making and a holistic constitutionalism alongside relevant remedial institutions, more opportunities can be created for people to resort to justice and claim and enjoy more rights in the society, and thus to rights-based development. There is no doubt, a scholar emphasized, development is about the emancipation of peoples from the conditions that impede material and cultural realization about their empowerment against structures of domination.[208] Also as Boyle and Chinkin suggest, the inadequacy of international law in changing conditions is a perennial concern, as is the claim for a dynamic international legal system in incorporating processes for amending and making laws commensurate with the demands upon it.[209]

2. Level of International Law

Reforming the international system through adjustments of laws and behavior in the international context involves substantially broader participation of stakeholders and attainment of full-fledged internationalism amongst the community of countries. But this remains a challenge, due to tensions inherent in the international law.

(a) Moral Concerns of International Law

When translated to public international law, the contrast between the exclusivity of domestic jurisdiction and the normative ability of a legal order to judge the rightness and wrongness of national actions is the major doctrinal tension. This tension has split international law from power politics and is responsible for the successive trivialization of private law. The key to understanding

these developments is to perceive the parallel between the irresolvable private law tension between self-determination and paternalism in the public law opposition of legal constraints and freedom. We must conceive it as a contradiction between legal structure and society rather than as a resolvable debate about the appropriate role of the legal structure. This is most crucial in international public law where the positive tradition equates legislators with the members of society affected by norms. It is because international law is horizontal or decentralized in the dominant positivist tradition that these private law conflicts are particularly crucial. At last, a judge seeking norms in policy argument must turn directly to moral discourse. Yet it was the indeterminacy of morality, which motivated the autonomous rule of law ideal. When normative inquiry precipitates only indeterminate tension in its search through rules according to considerations, it cannot help but remain in equilibrium until some substantive vision of morality is injected. Once legal reasoning has been exposed as substantive choice rather than determined objectivity, the legitimacy of an autonomous legal order is lost.

The structuring of criticism of international legal scholarship, at the outset, confronts a perplexing array of scholastic assumptions about the differentiating characteristics of legal thought and terminology, and becomes an immediate problem. If the term 'law' is used to refer to the broad normative social mediator of the tensions between power and freedom, it becomes difficult to refer to the concept of nonpolitical 'normativeness', often denoted as law. This progressive trivialization has resulted in a quandary of legal definitions, which use the term law at different levels of abstraction.

In the process, however, it is often appropriate to use the term to distinguish one side of the dilemma at a given level. For example, although the rule of law ideal in its negative political exclusionary terms is at best a model of social mediation fusing the political and the legal realms (standing between and criticizing both individual discretionary power and communal order), the rule of law ideal has been manufactured by the successive peeling off of morality (communal) and politics (discretion) from a core 'law' ideal.

This is the sense in which public international law has won its legitimacy by trivialization of the first power politics, followed by its own naturalist component and private law analog and so on. Only after confirming that this shrinking process has not purged the remaining 'law' of its paradoxical statuette, a broader understanding of law, which encompasses the entire conceptual model, can be rebuilt.

To the extent that the intention was to apply generalizations about change or social structure gleaned from a study of the industrial western rule of law, it did not happen. Such generalizations apply to the extent all models are responses to the same social problems. But the rule of law represents a particular response, which is no less problematic or unique than previous models. The application of these generalities will not be aided by terming earlier models as law or custom or anything else. As a result, the term law remains descriptive rather than normative, and clearly, from a moral standpoint, it seems meaningless to discuss whether a given system 'has law' or not.

(b) Internationalization of Participation

By analogy with the above discussions, if democracy within a specific country is important, democracy amongst countries is also important.[210] In our model, where the entire world is considered a single government and the countries as the governed (subjects), law-making in the international sphere should also be democratic, i.e., it should warrant the consent of all the countries.[211] An analogous view has also been shared by Andres Gros, who noted that for a text of convention, either bilateral or multilateral, to succeed, and therefore to legislate international law, one cannot only count, like in the international parliaments, on the vote of a majority; everything is ultimately negotiated, and relying only on sound legal doctrines to adopt a text is not enough; all should be convinced that the said text is the only, or the best, choice in the general interest of the representative States."[212] Securing consensus, therefore, remains a big challenge.

(i) Internationalizing Jurisdiction

Like courts within a specific country, there should be international courts for all the countries to resort to. And more importantly, analogous to a country, there should be a representative government for the world within the same constitutional framework for all. It may be far-fetched to imagine that the current international system would provide such a mechanism, as it is far less than the universal rule of law that many would prefer, which fails to grant all subjects the same status, fails to provide all the subjects opportunity to participate in law-making on an equal footing, the obstacles being of economic, political, and technical nature, and finally, fails also to provide an international judicial authority, which has mandate and jurisdiction over all the cases of international relations, depriving countries of real justice. Indeed, empowerment of all the countries and people is critical to rights-based development, in particular, for its sustainability.

In a similar vein, there cannot be empowerment without available remedies; remedies that can only be conceived through an international court system for all cases with mandate extending to all countries, territories, and governments alike. The challenge lies in ensuring the linkage between the duality in court structures and managing, with clarity, all jurisdictional issues. National courts up to a certain level and for certain cases (for which law may be different amongst countries), and international courts above that (at which level the applicable law will be the same),[213] offer a solution that may benefit more directly from the practice of countries where federal and state laws are working side by side, combined with the system of some commonwealth countries where appeals against the decisions of the Supreme Court can be made to the Judicial Committee of the Privy Council of the House of Lords.[214] Actually, in this context, it may also be recalled that, on the issues of human rights specifically, the Princeton Principles have already proposed a framework with techniques to manage the jurisdictional issues at municipal as well as international levels, to ensure accountability.[215]

(ii) Internationalizing Governance

The general reform proposed should not neglect the fundamental differences that still exist between national legal and constitutional system and the regulatory framework of the international community. As in the national system, general principles need some institutions and procedures to be implemented (a role fulfilled by the legislatures and the courts). In the international system, however, the implementation procedures have to be more subtle, yet fully achievable.

In this context, it may be recalled that the idea of a global people's assembly (GPA) had already been floated by many scholars. Although considered as utopian in the early days, the idea of GPA has been in fashion in more recent years. Some regions have already started to apply the idea in a modest way. The agenda for a European Constitution, a by-product of the European Union, is one such example.[216] For scholars like Falk and Strauss, the idea, which permits the vitalization of social interactions at all levels, would allow an internationally elected government (or an assembly), but would also challenge the traditional claim of states that each has a sovereign right to act autonomously, regardless of adverse external consequences.[217] This is why such scholars believe that if a GPA were to be introduced into this state-centric world, its democratic legitimacy would not immediately translate into formal law-making powers.[218] By force of inertia, traditional power structures would largely remain intergovernmental and the orthodox notion that international law is created by the states would pose serious conceptual and political challenges to the law-making powers. However, these scholars consider that the GPA has the potential to become more influential than the United Nations (which operates without a popularly elected organ) has thus far been.[219]

There are also scholars who think that [T]he epoch of global one-worldism appears to be premature, given the as yet utopian nature of attempts to consolidate the world's highly unequal sovereign nation-states into a single world system."[220] On the other hand, there are also those who argue that a new world order, along

with global governance, is already there. For such authors, governance is ensured thorough the complex global web of government networks. In that world, government officials (through their agencies) exchange information and coordinate activity across national borders to tackle crime, terrorism, and the daily routine chores of international relations.[221]

PART 6

IMPLEMENTATION

X

TOWARD A THEORY OF CHANGE

A holistic account of law and the international system as a conceptual and factual structure engenders a complex theory of change. If law, as a conceptual structure, is understood to result from, and influence action, a theory of change or development must account for the relationship between changes in legal theory and social changes. In other words, the development of law itself must be linked to the relationship between law and social change.[222] Such an exercise must be able to deal with the issue of instrumentalism, must be able to create complementarities between law and development, and, most importantly, should be geared toward demystifying the concepts and understandings thereof.

1. Instrumentalism

Legal concepts tend to prevent meaningful social innovation as prevailing legal structures inhibit implementation. Changing circumstances lead to an expansion by trivialization of legal concepts until they explode. The engine, which drives this dualistic structure, is the contradiction, which separates ideas from action and the ideal from the real, and prevents their synthesis or mediation.

Law and change literature has focused on the problem of legal instrumentality. This inquiry has taken two forms. First, following Max Weber's lead, theorists have attempted to establish certain necessary legal conditions to economic development. By setting up a legal institution of the western type, economic change could be permitted, if not actually facilitated.[223] This literature was hampered by the frustrating reversibility of legal doctrine and economic impact. Weber had recognized the 'problem of England', an industrial society

achieved with an anarchically feudal system of property laws. Economic development seemed compatible either with a legal structure freeing individual energies or with one structuring interactions.

Instrumentalism was taken to be the ability to use law to bring about discretionary changes in the customary social structure. This is the translation of discretion into custom. Instrumentality will vary inversely with law's differentiation from custom. The more autonomous law is from society, the more difficult it will be to implement change. This is the conclusion to be drawn from the factors isolated by philosophers like Karts, Friedman, and Evan as responsible for resistance to innovation.

For Karts, instrumentality depends on the disaffection of the middle level institutions and classes with the old order, which protects the upper classes and leaves the lower classes insecure.[224] By focusing on the strata, which must be mobilized, rather than on the whole society, Karts demonstrated that implementation would be easier if those to be mobilized favor the change. Belief in the possibility of instrumental law, given an appropriate connection between legal institutions and the social order, leads to faith in the possibility of meaningful reform within the legal structure. If institutions can be developed which are responsive to social needs, meaningful change can be brought about.

Law exists both within and without society. A theory of change must, therefore, account not only for the differentiation of law and society but also for their union. It must explain innovation as well as implementation. Because law springs from social life, our vision of the ideal is limited by its institutional manifestations. Tinkering with institutions may bring them into line with some ideal only if we can perceive that ideal independently. While implementation may be facilitated by the union of law and society, innovation is stifled. We may perceive injustice all around us and be able to alter social relations, but we have no criteria for determining what is just and what is unjust. Law will not provide us with normative guidelines which can determine outcomes.

Hence, legal reasoning leaves us confronted with the same substantive conflict, which motivated it. Reformers, then, blind us to the nature of social dilemma by attempting to repair and make more attractive a structure, which blocks our path to innovative change. The contentment of belief in mediation by law must be exposed as hypocritical if change is to be truly more meaningful. Anything less supports our misguided faith. It may be argued that this innovation has its origin in the gap between current law and current custom.[225] But this view misconceives the nature of meaningful innovation.

The process of law's response to changing social patterns is indeed one of change. This is the drive shaft of doctrinal change in law. The conceptual legal structure responds to divergences between legal explanation and facts by the creation of a new legal fiction. This dialectic process of response to diverging theory and reality explains the expansion of legal concepts to cover an ever greater area of social life. But this merely subjects new situations to old conceptual patterns. It extends oppressive conceptual structures but does not permit innovation outside those structures, or insight into the ideal.

The program of reform, then, is to wrest control of the process from those exercising political will and give it to the community. Implementation would be solved by the fusion of law and society. The people would inherit the innovative powers of their oppressors. This is often seen to be achievable by demystifying the rule of law, or exposing it as an instrument of political will.[226]

This view sees law only as a way of arranging social life, not as a parallel arrangement of ideas. These reformers fail because they acknowledge law's differentiation but not its union with society. The innovation with discretion is nothing more than the inverse of the oppression of custom. When the mediator is eliminated, as was attempted in Soviet Russia and in the People's Republic of China, the result can be an oscillation between political terror and spontaneous terror (both, however, under a rule of law system). Neither can innovate. An approach to law which focuses only on

its ability to translate discretion into custom is no more useful than the reciprocal partial explanation of law as responsive only to custom.

2. Complementarity

The dual problem of innovation and implementation can only be faced if the reformers who protect law are stripped of their illusions about its instrumentality. This process can be started by exploring the complementary development of legal theory in response to social phenomena.

Generally speaking, legal concepts are responses to the contradictions of man's individual and social existence. This claim can be substantiated by examining legal doctrines for reenactments of these tensions. As the tension becomes apparent in a given legal doctrine, the faith in mediation can be maintained by restructuring the doctrine parallel to the tension. In other words, legal doctrine would develop by applying a mediating strategy to ever more instances of social tension. This occurs in two ways. First, law may expand hierarchically subjecting deeper levels of doctrine to the same structure. This model is experienced as the trivialization of law. International law is split from politics to protect the positivist connection; the tension is then reenacted between naturalist and positivist strains, then between treaty and customary law, then between stiff *(pacta sunt servanda)* and flexible *(rebus sic stantibus)* views of treaty law and so forth. In the same vein, public law is splintered from private law, and then, public claims are splintered between acts *jure imperii* and *jure gestionis* and so forth.

The mediation goes on at a higher level of generality. Just as hierarchical expansion replays the tension at lower levels of specificity, so horizontal expansion replays it on an ever higher plane. Development along these two axes preserves the sense of mediation. The most recent expansion and mutation of the model has been in response to the (i) proliferation of primary actors of different sizes, (ii) interpenetration of primary and secondary actors, and (iii) application of the model to the new subject matter of

economic and social cohabitation and welfare rather than simply peace and security.

Expansion along both these axes, however, reaches a limit. As hierarchic development progresses, faith in the meaningfulness of higher level distinctions is eroded by each reenactment of the tension. Nevertheless, the distinctions continue to be used to determine outcomes. As this startling combination of reliance upon, and disillusionment with, legal categories affects the legal profession, faith in the autonomy of law dwindles.

This is the response to trivialization and is experienced as a tendency to regard law as irrelevant to social activity. In its irrelevance, it ceases to mediate social tensions. Simultaneously, however, the horizontal expansion of legal theory brings larger areas of social activity within the legal order. In that process, the model mutates in all its previous applications to become more general. As it becomes more general, it also seems less outcome-determinative. Finally, it reaches such a level of abstraction that it ends up contradicting its own premises.

The model has expanded to account for polar opposite results within the same mediating framework. At this point, the faith in law as the mediator breaks down. The two developments recreate a contradiction between the general and the particular. When pushed further, the legal doctrine becomes simultaneously too specific and too general to succeed in mediating the social contradictions that gave rise to it. This is how the legal structure implodes.

There are, then, two dimensions to the interplay of law and change. Ideas stifle change not only in implementation, but also in innovation. This is the result of law's existence within and without a society, as a response to both custom and discretion, but not autonomous from either. When reformers can change behavior, they cannot see the ideal beyond the real. When this perception is possible, they cannot implement innovations in a frozen social structure from which they remain separate. No midpoint is possible between these dilemmas, for by their nature the existence of either denies the other, and yet each is insufficient for meaningful change.

Ideas themselves, however, respond to social life by expansion and mutation. Eventually, they dissolve into restatements of the contradictions they earlier sought to explain. These two tendencies are rooted in the contradictions at every level of individual and social existence.

3. Demystification

If the above model of law, reasoning, and change is correct, one wonders about the shape a post-implosion world might take and about the program of action which lingers for legal scholars. It may be that obfuscation is all we can hope for. The suffering required exploding religious faith and the cozy symbiotic cross-legitimating of the ecclesiastical and the secular prior to 1648 would not seem warranted if man moved only to a new oppressive ideology. If such labor can only produce another mediating myth, the human struggle seems pathetically futile. If we are by nature too weak to face the conflicts within us, we may prefer a pleasant mythology.

The 1648 watershed is crucial, for it commenced the formal differentiation of the *domestic* and the *international* separated by the impenetrable sovereign state and an enduring positivist bias and motivated neopositivist differentiation between the *legal* and the *political*. The area of discourse responding to national particularism and absolutism became the foundation of international law. This gave international law writers to choose 1648 as the birth date of modern international law.[227] The ideological remnants of empire and papacy, which perhaps could have been the informing dogma of a new communal order, were cleaved from law entirely. This bifurcation began the process of legal trivialization for a parallel nonconsensual structure developed in the realm of politics. Responding to the national particularist limitations of positivist law, the political systems, which have been the traditional subject matter of diplomatic history, expressed the existence of a communal order. This tension in the broad model of mediation between the legal and the political was replayed within the compatibility of the communal political restructure and the discretionary positivist order,

which has traditionally been labeled 'public international law'. Both political and legal writers fail when they attempt explanation by relying on either pillar, or upon some compromised lowest common denominator.

The post-implosion world would be a brutish one compared to the contentment of belief in legitimate mediation. If we cannot hope to end oppression, we had best not expose the myth, which renders it palatable. Demystification could only create suffering and disorder until a new myth could be hammered together. Legal scholars then should direct themselves to repairing and reforming the shaky structure, which protects us from the contradictions of our nature. We should strive for group harmony rather than freedom because true freedom would bring only the slavery of suffering. We could reject this vision only out of a faith in the possibility of human progress and could only begin to test that possibility by shedding the myths, which stifle innovation. Collectively, we could then begin the task of building a social order, which could solve the riddle of contradictions, and could hammer out substantive responses to the choices between community and autonomy. This process of communal growth need not be brutal if we are right about the sources of the contradictions that confront us.

PART 7

CONCLUSION

XI

WHITHER INTERNATIONAL JUSTICE ?

The foregoing chapters have attempted to underscore the correlation of legal structure and development from the perspective of jurists viewing international relations and the system peripheral thereto with the lens of developing countries. By analyzing briefly the legal structure (norm, process, and institution) of several human activities and endeavors (social, political, and economic), these chapters have also demonstrated that it is possible to draw conclusions in respect of the correlation between the system of law (order and stability) and development (change, restructuring, and adjustment). Also, this study has demonstrated that it is not generally the sheer inefficiency of the receiving societies, but the systemic deficiencies along with the ever-increasing complexities of the system of the contemporary times that are the causes of failure of the international system in dispensing global justice.[228]

In view of the several anachronisms noted throughout this study: the gradual dissipation of the system through the dualism in process it has generated, the growing lack of confidence amongst many actors vis-à-vis the system, the lack of empowerment of countries and peoples, and the inconsistencies in the deliverables including lack of equality of benefit for all, it is clear that the current system has failed to remain 'international'. Ensuring international justice and guaranteeing the right to development, through this system, therefore, does not seem easy. Consequently, there is a real need for changing the existing equilibrium, sustained on the basis of an erroneous power equation and false balance of power. Reshaping the old-style equilibrium (wherein only a few nations influence decision-making) into a new-style equilibrium (wherein all the states

participate in making decisions) needs to take place. But for this to happen, it is imperative to change the approach that has prevailed in the world for decades.[229] Nonetheless, for the critique to have meaning, a broader vision of change is needed rather than one focusing on tinkering with institutions to bring them into line with dimly perceived ideals.

The new vision to make the global system useful and acceptable will largely be based on five ideas: subsidiarity, multilevel governance, multiactor politics, networks, and prudential limits to globalization. 'Subsidiarity' recognizes that even though national capacities can be limited by globalization, and though supranational bodies must play an increasing role, the nation-state is both the primary source of democratic legitimacy and the most powerful actor in global governance. Consequently, anything that can be handled at the national level should be kept there. Subsidiarity in this sense is not limited to the State level and can reach down further. 'Multilevel governance' recognizes that governance increasingly involves coordination of multiple levels of government, as tasks once focused at the national level are either taken over by supranational institutions or devolved to local units. 'Multiactor politics' recognizes that new actors, particularly corporations and NGOs, have joined national governments and international organizations as key players in global governance and must be integrated into policy processes. The stress on 'networks' takes into account the fact that much of the work of governing the world economy is conducted through networks of one kind or another and that any realistic system of governance must build on these processes and relationships. In addition, the idea of 'prudential limitations' on the scope of globalization reflects the view that real tensions exist between the imperatives of economic integration and important national or subnational values, so that integration policies must be flexible and nations must be able to opt out of the global processes and requirements from time to time.

The problems of implementation in a frozen customary social fabric are familiar enough. But this should hardly deter us from pressing ahead or flinching from action. After all, if a thing is worth doing, it is worth doing well, to recall Lord Chesterfield. Therefore, if the model of law and legal thinking we posit is valid, a theory of change is needed to accomplish two main objectives.

First, it must account for the dual problem of implementation and innovation. It must address not only the problem of differentiation of actor and subject (which blocks implementation) but of their union (which facilitates). Institutions must be a part of society to be effective, but must also be separate from it to be innovative. Indeed, meaningful willed change requires both differentiation from social fabric and union with it.

Second, the change theory must address the process by which the conceptual models mediating the conflict between differentiation and solidarity themselves change, develop, or collapse. Such insights are necessary to substantiate the claim that these models represent impositions as well as outgrowths of human nature. If the current model can be critiqued as but a single attempt to mediate the international problems of order and power, we must comprehend the processes of its growth and of its possible or potential demise and be able to distinguish its expansion from its explosion. The growth of a model of law or legal thinking is seen in the expansion of a mediating structure to cover an increasing number of doctrinal areas. This universalization of the mechanism is achieved through a process of repeated divergence between actualities and explanations, which are synthesized by the creation of a new fictional structure, hopefully acceptable to all countries, communities, and people!

ENDNOTES

1 Scholarship seems united in the belief that rule of law and good governance have until now delivered neither improved rule of law nor improved governance. See Thomas F. McInerney, 'Law and Development as Democratic Practice', *Voices of Development Jurists,* Vol. I., No. 1 (IDLO, 2004).

2 See Jack L. Goldsmith and Eric A. Borton, *The Limits of International Law* (Oxford University Press, 2005), p 225.

3 At the end of the Thirty Years' War (the so-called religious war between Reformation and Counter-Reformation, which involved Germany, the Hapsburg Empire, France, Sweden, Bohemia, and Denmark), the Peace of Westphalia was signed on 24 October 1648. The Peace of Westphalia, also known as the treaties of *Münster* and *Osnabrück* respectively, comprised treaties that ended the Thirty Years' War and 'officially' recognized the United Provinces. For the first time, a European community of sovereign states was established. Along with the essential principle of fostering a community among nations, the Peace of Westphalia recognized all of its members as having equal legal standing, and guaranteed each other their independence. After lengthy negotiations during 1644-48, in the end, Protestants, Catholics, monarchies, and republican forms of government were treated as having equal status in negotiations and in the Peace treaty.

The Peace of Westphalia is one of the milestones in the history of development up to the point of current international law. Following it, the medieval idea of the unity of western Christianity under the leadership of the Kaiser and the Pope was abandoned, and was replaced by the concept of sovereign states with equal rights based on an inter-governmental order constituted of treaties and international law. It is often said that the Peace of Westphalia initiated the modern fashion of diplomacy and marked the beginning of the modern system of nation-states. It also laid rest to the idea of the Holy Roman Empire having secular dominion over the entire Christian world. The nation-state would be the highest level of government, subservient to no others.

As such, therefore, almost all scholars believe that the dual character of international law results from its Westphalian legacy in which law functions among states (rather than above states), and in which the state carries out the legislative, judicial, and executive functions that in domestic legal systems are performed by separate jurisdictions. See Paul F. Diehl, Charlotte Ku, and Daniel Zamora,

'The Dynamics of International Law: The Interaction of Normative and Operating Systems', in 57 *International Organization* (Winter 2003), p 46; see also Louis W. Goodman, 'Democracy, Sovereignty and Intervention', in 9 *Am. UJIL & Pol'y*, p 27 (noting that sovereignty is the notion that the state has the authority to exercise power within national borders free of external interference). See also Edward L. Morse, *Modernization and The Transformation of International Relations* (Free Press 1976), pp 22-46 (on the Westphalian system and classical statecraft) and pp 153-159 (on the Westphalian system of international relations) and Thomas H. Lee, 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today', in 67 *Law & Contemp. Probs.* 147.

4 Many scholars are emphatic about the fact that international affairs have always been characterized by extreme inequalities. For most of history, according to such scholars, international affairs have been dominated by very few states, and their modern history is, in an important part, that of the rise and fall of great powers. See, for instance, Nico Krisch, 'More Equal than the rest? Hierarchy, equality and US predominance in international law', in *United States Hegemony and The Foundations of International Law* (Michael Byers and Georg Nolte, Eds, Cambridge University Press, 2003), p 137 (also citing Paul M. Kennedy, *The Rise and Fall of the Great Powers,* New York: Random House, 1987). Similarly, Philip Allott, much more emphatically, considers the current configuration of 'international relations' to represent a diseased, pathological condition in which humanity has trapped itself through ideas that have constructed an 'intergovernmental international unsociety' whose institutions and rules, including international law, are archaic, absurd, and unbearable. See Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press, 2002), p 289. Allott further describes the existing condition of diseased international anarchy as a form of contagious madness that must be overcome through a human revolution, a revolution not in the streets but in the human mind. See Allott, id. p 157. See also generally, Ahmed Jehani and Kishor Uprety, *A Perspective on Globalization, International Justice and Right to Development: Controversies and Anachronisms* (SADLC, 2003); see also, Pemmaraju Sreenivasa Rao, 'The Indian Position on Some General Principles of International Law', in *India and International Law* (Bimal N. Patel, Ed., Martinus Nijhoff, 2005), p 34 (noting the euro-centric nature of international law).

5 For perspectives on the origins of the concept and the present meaning of development, see Majid Rahnena, 'Under the Banner of Development', in *Development, Seeds of Change: Village through Global Order* (Rome, 1986:1/2), pp 37-46.

6 In 1950s, the modernization theory of political development movement borrowed its basic tenets from Weber's finding on rise of capitalism. It assumed that development was "an inevitable, evolutionary process of increasing societal differentiation that would ultimately produce economic, political and social institutions similar to those in the West". The end result of this process would be 'creation of a free market system, liberal democratic political institutions and the rule of law'. However, the reality in the developing world was proving to be quite resistant to the theory and as such, the modernization theory of political development movement began to collapse by the late 1960s. The initial blame for failure was, then, imposed on the internal civic, economic, and political culture of the developing countries. See Barrister Tureen Afroz, 'Why our laws have failed to promote development?', *The Daily Star*, No. 125 (January 18, 2004).

7 See generally, Dermot Mccann, 'Small States in Globalizing Markets: The End of National Economic Sovereignty', in 34 *NYU JILP* (2001), p 285. Indeed, as noted by a scholar, "globalization has many faces in trade, finance, investment and production systems. It affects development, thinking and action, relegating ethnical, equity and social concerns, behind market consideration and reducing the autonomy of State". See Wahab O. Egbewolf, 'Globalization and Its challenges on national legal systems: A case study of Nigeria', 43 *IJIL*, p 332. Another scholar, Eleanor Fox, also noted, "Thus far, trade law and policy have particularly enriched the industrialized countries and the peoples who are better off. The time has come to think more seriously about how trade measures and derogations from them can be used to empower those who are worse off and, as well, to consider how to bring democratic principles and process rights more firmly into the institution of the WTO". See Eleanor M. Fox, 'Globalization and Human Rights: Looking out for the Welfare of the Worst Off', in 35 *NYU JILP*, p 219.

8 See Mccann, *supra* note 7, p 285.

9 See also M. Sornarajah, 'The Asian Perspective to International Law in the Age of Globalization', in 5 *Sing. J. of Int'l & Comp. Law* (2001), p 288 (particularly on denial of personality for some people). Also, in this context, Ferguson has referred to globalization (specifically political) as just a fancy word for imperialism, imposing your values and institutions on others. He also notes that you dress it up, and whatever rhetoric you may use, it is not very different in practice to what Britain did in the eighteenth and nineteenth centuries. See Bryan Mabee, 'Discourses of empire: the US empire, globalization and international relations', in 25 *Third World Quarterly*, (2004), p 1360 (citing N. Ferguson, 'Welcome to the new imperialism', in *The Guardian*, 31 October 2001). But no doubt, 'Globalization' is a multidimensional phenomenon,

comprising numerous complex and interrelated processes that have dynamism of their own. See Dinah Shelton, 'Protecting Human Rights in a Globalizing World', in *International Law. Classic and Contemporary Readings* (Charlotte Ku and Paul F. Diehl, Eds, 2004), p 334.

10 See also generally, Claudio Grossman and Daniel D. Bradlow, 'Are We Being Propelled Towards A People-Centered Transnational Legal Order?', in 9 *Am. CU. J. Int'l L & Pol'y.* pp 1-2. It is also important to note that Western theory accepts that there is a significant correlation between effective legal systems and economic growth. Western theories about law and social change view legal change primarily as an important but evolutionary process that interacts with a similarly evolutionary process of social and economic change. See, for instance, *The Role of Law and Legal Institutions in Asian Economic Development* 1960-1995, Executive Summary of the Report prepared for the Asian Development Bank, by Katharina Pistor and Philip A Wellons 2005), p 3. See also, generally, an interesting book by Erik Orsenna, *Voyage aux Pays du Coton. Petit Precis de Mondialisation* (Fayard, 2006) (especially the Part *Gloire au lobby*), pp 56-97.

11 See also Mahmood Monshipouri, 'Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries', 4 *Yale Human Rights & Development L. J.* (2001), p 35. See also B. S. Chimni, who notes that at present, international law is unable to seriously respond to the expectations of a vast majority of the peoples of the third world both in terms of maintaining global order and, despite its exponential growth in recent years, promoting global justice. He further adds that, on the one hand, contemporary international law is unable to prevent the unlawful use of force against third world states and peoples, and, on the other hand, global poverty and inequality have become a scourge of our times and ranks, and according to Nelson Mandela, 'alongside slavery and apartheid as social evils.' See, 22 *Am.U. Int'l L.* Rev 199, pp 200-201.

12 See introduction, *United States Hegemony and The Foundations of International Law* (Michael Byers and Georg Nolte, Eds, Cambridge University Press, 2003); see also Wilhelm Grewe's views, id., p 1 (citing *Epochen der Volkerrechtsgeschichte* (Baden-Baden: Nomos 1984). Also, in 1983, the Late Professor R. J. Dupuy, in the context of a workshop, made an interesting observation: "The main phenomenon which seemed to challenge the future of international law today is the emergence on the international scene of cultural systems other than the Western which prevailed so far". The Late Professor Dupuy, then, asked whether this endangered the future of international law, or, on the contrary, whether it added new currents to it, thus making it richer. Scholars have also agreed with the assumption that public international has a past, being Western in inception, and that its actual validity has been put in issue by Non-

Western systems of norms and values. See Adda B. Bozeman, 'An Introduction to Various Cultural Traditions of International Law-A preliminary Assessment', in *The Future of International Law in A Multicultural World,* (Rene-Jean Dupuy, Ed.,Workshop, The Hague, 17-19 November 1983, Hague Academy of International Law, Martinus Nijhoff, 1984), p 85. In a similar vein, Professor Chimni noted that the international law that has emerged in the last three decades, in particular since the end of the Cold War, has been shaped by an emerging transnational capitalist class to realize its interests. According to him, the prescription and enforcement of these international laws has required the construction of a nascent Global State that is constituted by a range of international institutions and global social processes, and is backed by the commanding monopoly of Western states over the use of organized force. He further added that the emergence of a nascent Global State has meant that a global class divide is overlaying the North-South Divide creating a complex map of global fractures. *See* Chimni, *supra* note 11, p 201.

Views about continual hegemonic behavior of countries abound. For instance, the first lady of Code d'Ivoire, Mrs. Simone Gbagbo, noted quite bluntly: "Some French political and economic players have had the habit of treating Africans in a master-servant manner, yet a new generation of Africans want this type of relationship to change. In this type of master-servant relationship, the French expect to come to our countries and be masters of our wealth and resources as though that is their divine right. They think we cannot exploit these resources without their consent. We don't even have the right to set up factories to transform these raw materials into finished goods. We are expected to sell all our produce in raw form and this was laid down in so-called "cooperation agreements" between France and its former African colonies. Each time an African raises his or her voice to demand change to these agreements, the African is considered an enemy of France who must be fought." She further added, "The wealth which we produce in the Economic and Monetary Union of West Africa and which enables us to buy foreign goods is represented by the CFA Franc, our currency. But this CFA franc is kept in the French Treasury; 65% of the resource of our countries is kept in the French Treasury. This is to say that all our hard currency, and that of all other African countries that use CFA franc, is deposited in the French Treasury. This means that at the international level, we do not exist; it is the French Treasury that exists." See interview given by Simone Gbagbo to Ruth Tete, in *New African* (August/September 2007, No. 465), p 28.

13 Sovereign equality has a peculiar normative structure and is an inherently unstable concept, always torn between idealist aspirations

and realist concessions. At its most palpable level - the level of concrete rules- it has never imposed significant constraints on the exercise of predominant power, but has accommodated the most overt form of hegemony. See Nico Krisch, 'Hierarchy, Equality and United States Predominance', in *United States Hegemony And The Foundations of International Law* (Michael Byers and Georg Nolte Eds.), *supra* note 12, p 141. Also, R. P. Anand has noted emphatically that international law developed for the protection of European interests. See, for instance, *The Future of International Law in a Multicultural World* (Rene-Jean Dupuy, Ed., Workshop, The Hague, 17-19 November 1983, Hague Academy of International Law, Martinus Nijhoff, 1984), pp 110-111. See also generally, Manohar L. Sarin, 'The Asian-African States and the Development of International Law' in *The Future of International Law in a Multicultural World* (Rene-Jean Dupuy, Ed.), id., pp 117-140.

14 See Somarajah, *supra* note 9, p 285.

15 The term law is troubling in a sense. For the purpose of this study, law, here, refers to an entire system of individual laws and ideas about laws, not to the particular laws, which are its components. It is meant to refer to the entire body of law, not only a specific legislative enactment. Actually, this notional difference can be better understood in the French sense of *Droit*, as opposed to *Loi*.

16 The modern history of Bangladesh, Panama, Sikkim, and Tibet, the continual changing political equation in the Middle East, or the new republics in the group of countries created after the break-up of the Soviet Union, provide few examples of such manipulation. In this context, see also generally, Max Liniger-Goumaz, *Comment On S'empare D'un Pays-La Guinee Equatoriale* (Les Editions du Temps, Geneva, 1989). See also Muriel Mirak-Weissbach, 'Shades of Sykes-Picot Accord are Cast over Southwest', in *Executive Intelligence Review* (Washington, D.C., February 10, 2006), pp 6-15.

The history, in other parts of the world, also confirms similar tactics. The minutes of a meeting of senior intelligence officers on 17 September 1970 read: "The director [of the CIA, Richard Helms] told the group that President Nixon has decided that an Allende regime in Chile is not acceptable to the United States.... The President asked the Agency to prevent Allende from coming to power or to unseat him. The president authorized US$ 10 million for this purpose, if needed. Further, the Agency is to carry out this mission without coordination with the Departments of State and Defence." See Mabasa Sasa, 'A Chilean example', in *New African* (August/September 2007, No. 465), p 144.

Economic sabotage has historically been the weapon of choice in America's armamentarium on regime change. This usually starts

with the imposition of indirect sanctions through the unofficial suspension or freezing of credit lines. In a declassified Status report on Restrictions on IBRD lending to Chile, the US government indicated that infrastructure development aid would not be renewed to the country through the simple use of bureaucratic strictures designed to automatically eliminate the creditworthiness of basically any developing country. The Executive Director of the IBRD was instructed by the Acting Assistant Secretary of State for Inter-American affairs to ensure that Chile never saw a dime of aid, but "without the hand of the US Government showing in the process". See Mabasa Sasa, 'A Chilean example,' in *New African, supra* p 145. Similarly, on 9 November 1970, Henry Kissinger, on behalf of the US National Security Council wrote the following 'Top Secret, Sensitive Eyes Only' National Security Decision Memorandum 93 to the American Secretary of State, Secretary of Defense, the Director of the Office of the Emergency Preparedness, and the Director of the Central Intelligence, underscoring the President's decision that (i) the public posture of the US will be correct but cool, to avoid giving the Allende government a basis for which to rally domestic and international support for the consolidation of the regime; but that (ii) the US will seek to maximize pressures on the Allende government to prevent its consolidation and limit its ability to implement policies contrary to US and hemisphere's interests. See Mabasa Sasa, 'A Chilean example', in *New African, supra,* p 146.

The memorandum also recommended that vigorous efforts be undertaken to assure that other governments in Latin America understand fully that the US opposes consolidation of a communist State in Chile hostile to interests of the US and other hemisphere nations, and to the extent possible encourage them to adopt a similar posture. See Mabasa Sasa, 'A Chilean example', in *New African, supra,* p 146.

The memorandum further recommended that close consultation be established with key governments in Latin America, particularly Brazil and Argentina to coordinate efforts to oppose Chilean moves which may be contrary to our mutual interests; in pursuit of this objective, efforts should increase to establish and maintain close relations with friendly military leaders to the hemisphere. See Mabasa Sasa, 'A Chilean example', in *New African, supra,* p 146.

17 In this context, interestingly for some time, some Austrian activists have been fighting to get a chimp, Hiasl, more rights (to own property and receive monetary donations). This would be the first case of an animal gaining 'person' status. In this test case that could set a global legal precedent for granting basic rights to apes, Austrian animal rights advocates are waging an unusual court battle to get the 26-year-old

male chimpanzee legally declared a 'person'. Hiasl's supporters argue that he needs that status to become a legal entity, which can receive donations and get a guardian to look out for his interests. Their main argument is that Hiasl is a person and has basic legal rights, by which they mean the right to life, the right to not be tortured, and the right to freedom under certain conditions (not necessarily the right to vote). Actually, Austria is not the only country where primate rights are being debated. Spain's parliament is considering a bill that would endorse the Great Ape Project, a Seattle-based international initiative to extend 'fundamental moral and legal protections' to apes. Indeed, if Hiasl gets a guardian, it will be the first time the species barrier will have been crossed for legal 'personhood'. Actually, a Briton petitioned a district court to be Hiasl's legal trustee. On April 24, 2007, the Judge rejected her request, ruling that Hiasl didn't meet the two key tests: He is neither mentally impaired nor in an emergency. Although the judge expressed concern that awarding Hiasl a guardian could create the impression that animals essentially enjoy the same legal status as humans, the judge did not rule that he could never be considered a person. See 'Monkey battle for 'person' status', AP News posted, May 4, 2007.

18 Indeed, a mechanism is necessary in the realm of ideas as well as in social life, which can stabilize and explain the constant struggle over truth and power. A model of social order interacts with social life to structure and stabilize the indeterminacy, which results from the antinomies of morality and power or community and autonomy and the separation of self and other or real and ideal. This model is then trapped in a reenactment of these same tensions at each level of its internal structure. By its discourse, the model reduces the anguish of unmediated confrontation with the conflicts of order and power.

19 For a brief discussion, see James Ottavio Castagnera, 'Groping Toward Utopia: Capitalism, Public Policy and Rawls's Theory of Justice', in 11 J. *Transnational Law & Policy* (2002), pp 297-298. Philip Allott noted that, in the 20th century, democracy surrendered to capitalism, in war and in peace. Democracy-capitalism became capitalism-democracy, a nexus of economic and political power in which economic power became the engine of social change, national, and global. See Philip Allott, 'The Emerging International Aristocracy', 35 *NYU JILP*, p 315. It is interesting to note that Fukuyama has implied that today's China and Russia have both happily accepted the capitalist half of the partnership between capitalism and democracy. Mao and Stalin, by contrast, pursued self-defeating autarkic economic policies. See, for instance, Francis Fukuyama, 'They can only go so far', in *Washington Post* (August 24, 2008).

20 Some scholars also look into the relationship between economic, social, and cultural rights and right to development either as a concept or as a new paradigm, and the whole process of 'wealth creation', as a process that is influenced as much by external factors as by internal factors.

21 For the purpose of this study, the term 'international community', used rather loosely, is meant to include all the actors involved in reinforcing and reinvigorating international relations.

22 The numerous campaigns against nationalization by states (oil, gas, or minerals) are clear examples. Nobel Laureate Joseph Stiglitz has also noted: "...the advanced industrial countries actually created a global trade regime that helped special corporate and financial interests, and hurt the poorest countries of the world." See Joseph E Stiglitz, *Making Globalization Work* (Norton and Co., 2006), p xii (Preface) and p 4.

23 See Charles E. Rosenberg, 'Anxiety, Ideology, and Order: Reflections on the Making of American Public Policy', in *Power and Law: American Dilemma in World Affairs* (Charles A. Baker, Ed., Johns Hopkins, 1970), p 31 (commenting on the US context, but applicable to all developed countries).

24 Charles Zorgbibe, *La Paix* (Que Sais-Je? Presse Universitaire de France, 1984), p 3.

25 Id.

26 Indeed, the significant differences in economic development create new contradictions. The classical international law, which was based on the logic of liberalism, and which was left essentially to 'the invisible hand', does not currently tolerate equality, mainly when applied to economic exchange.

27 For discussions about international community, see Edward Kwakwa, 'The international community, international law, and the United States: three in one, two against one, or one and the same?' in *United States Hegemony and The Foundations of International Law, supra* note 12, pp 27-35.

28 See for detailed discussions, Gerald A. Sumida, 'The Right of Revolution: Implications for International Law and World Order', in *Power and Law. American Dilemma in World Affairs* (Charles A. Baker, Ed., Johns Hopkins, 1970), p 164.

29 Allusion is made to an agreement reached near the end of the Second World War between President Franklin D. Roosevelt of the United States, Prime Minister Winston Churchill of Great Britain, and Premier Joseph Stalin of the Soviet Union who met in Yalta in February 1945, to discuss issues, among others, a common strategy against Japan. Most of the important decisions made remained secret until the end of World War II (the complete text of all the agreements was not disclosed until 1947). The Yalta powers confirmed the policy

adopted at the Conference of Casablanca of demanding Germany's unconditional surrender. Plans were made for dividing Germany into four zones of occupation (American, British, French, and Soviet) under a unified control commission in Berlin, for war crimes trials, and for a study of the reparations question. Agreement was also reached on reorganizing the Polish Lublin government 'on a broader democratic basis' that would include members of Poland's London government-in-exile, which the Western Allies had supported. The Powers decided to ask China and France to join them in sponsoring the founding conference of the United Nations to be convened in San Francisco on April 25, 1945, and agreement was reached on using the veto system of voting in the projected Security Council. Future meetings of the foreign ministers of the 'Big Three' were planned. The USSR secretly agreed to enter the war against Japan within three months of Germany's surrender and was promised S Sakhalin, the Kuril Islands, and an occupation zone in Korea. The secret agreement respecting the disposal of Japan's holdings also provided that the port of Dalian (Dairen) should be internationalized, that Port Arthur should be restored to its status before the 1904-5 Russo-Japanese War as a Russian naval base, and that the Manchurian railroads should be under joint Chinese-Soviet administration. China later protested that it was not informed of these decisions concerning its territory and that its sovereignty was infringed. The United States and Great Britain also agreed to recognize the autonomy of Outer Mongolia, and to admit Ukraine and Belorussia (Belarus) to the United Nations as full members. The Yalta agreements were disputed even before the Postdam Conference later in 1945. The subsequent outbreak of the cold war and Soviet successes in Eastern Europe led to much criticism in the United States of the Yalta Conference and of Roosevelt, who was accused of delivering Eastern Europe to Communist domination. See *The Columbia Encyclopedia,* Sixth Edition (Columbia University Press, 2006). It may be interesting to note that the Prime Minister of India Manmohan Singh also once admitted that the UN was often unable to exert an effective influence on global and political issues of critical importance, which he considered, was due to its "democracy deficit". See Pemmaraju Srinivasa Rao, *supra* note 4, p 60; see also, for detailed discussions, John G. Stoessinger, *The United Nations and the Superpowers: China, Russia, and America* (Random House, New York, 4th edition, 1977), pp 3-23.

30 See UN Chronicle, March-May 2005. See also, for an interesting discussion on the use and values of consensus in international organizations, Anthony D'Amato, 'On Consensus', 8 *Canadian Yearbook of International Law* 104 (1970).

31 See, for detail, Tafsir Malick Ndiaye, *'Matieres Premieres Et Droit International'* (Les Nouvelles Editions Africaines du Sénégal, 1992). For a Marxist perspective, see also generally, E. Nukhovich, *International Monopolies and Developing Countries* (Progress Publishers, 1980); see also generally, Jack L. Goldsmith and Erica A. Posner, *The Limits of International Law* (Oxford University Press, 2005).

32 As noted by a scholar, "despite the difficulties of generalizing about a phenomenon as complex and contradictory as globalization, considerable evidence suggests that globalization intensifies inequalities both within and between states and that, on the whole, it further undermines the precarious position of the poorest and most vulnerable, the vast majority of whom live in the third world countries." See Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World', 32 *J. INT'L L & POL,* p 246. For tactical moves of MNCs/TNCs, see also, Egon Kemenes, 'Financing and Market Penetration by Multinational Corporations', *Impact of Science and Technology,* 1986 (UNESCO No. 141), pp 27-35; see also, Lema C. Forje and John W. Forje, 'Critical Perspectives on research, High Technology, the Multinational Corporations and Underdevelopment in Africa', *Impact of Science and Technology,* 1986 (UNESCO No. 141), pp 37-49.

33 Some scholars further note that in terms of the new world order, the largest TNCs are central players. They influence the policies of government worldwide; they help to order the agenda of the WTO; they influence the destinies of individual economies in the developing world; they have a crucial impact on the eco-system; they set wage-levels, which can cause the first world to bend their demands, and so on. Any constitutional architect who does not attempt to set a framework of accountability and global citizenship for the TNCs would demean their craft. See Sorcha Macleod and Douglas Lewis, 'Transnational Corporations. Power, Influence and Responsibility', 4 *Global Social Policy* 1 (2004), p 77. For an interesting discussion on the imperialization of coverage of MNCs, *see* Alan Shipman, *The Globalization Myth* (Icon Books, 2002) (in particular, Chapter 1, pp 48-60).

34 See generally Grossman and Bradlow, *supra* note 10, pp 7-8 (noting that the ability of TNCs to plan and operate on a global basis grew dramatically as the post-World War II era unfolded).

35 See Ratnakar Adhikari, 'The Globalization Mantra: Implications for Developing Countries', in *Globalization. South Asian Perspective.* Monograph 1 (SAWTEE, 2000), p 34. For a very interesting analysis, see also Stiglitz, *supra* note 22, pp 61-101 (Chapter on Making Trade Fair).

36 Also it is worth noting that in 1973, the United Nations Economic and Social Council assigned a 'Group of Eminent Persons' the task of

advising on matters related to transnational corporations (TNCs) and their impact on the development process. The Group of Eminent Persons took public comments and concluded that TNCs were of increasing importance in the world economy and in the developing process, particularly as sources of foreign direct investment (FDI), and trade and technology transfer. The Group recommended that a permanent program of work and a Centre be established to study TNCs and related policy issues. The Group also recommended the creation of a Commission on Transnational Corporations to which the Centre was to report. The Commission provided the intergovernmental forum on transnational corporations while the Center undertook a program of information gathering, research and policy analysis, technical assistance, and consensus-building to support the work of the Commission. Actually, the international regulation of transnational corporations had already long been the subject of heated debate. In the early 1960s, the UN had called for comprehensive international regulatory regimes as part of a broader push toward a socially-just New International Economic Order. In 1972, the first calls for international codes of conduct for TNCs were made at the UNCTAD (UN Conference on Trade and Development) Conference in Santiago. Following that the UN Economic and Social Council (ECOSOC) went on to set up a UN Commission on Transnational Corporations, with a UN Center on Transnational Corporations (UNCTC) as its research and administrative body. In 1976, the Commission made a UN Code of Conduct on Transnational Corporations one of its top priorities. But by the early 1980s, the tide had started to turn against the regulation of TNCs. The neoliberal credo of liberalization, privatization and de-regulation, sometimes followed by re-regulation in the interests of transnational corporations (known as the Washington Consensus) gradually spread all over the world. By the mid-1980s, efforts to draw up a UN Code of Conduct for TNCs had almost been abandoned. In March 1991, the US government requested all its foreign embassies to lobby their host governments to quietly build a consensus against further negotiations on the UN Code. The Code's official demise came in 1992, when the president of the UN General Assembly reported that delegations felt that the changed international environment and the importance attached to encouraging foreign investment required a fresh approach.

37 See, for instance, Jagdish Bhagawati, 'Targeting Rich Country Protection', in *Finance and Development* (Vol. 38, No. 3, September 2001), IMF, pp 14-15; see also, Arvind Panagariya, Free Trade's Real Villains, in *Foreign Policy* (November-December 2003), pp 20-25; see also generally, Joyeeta Gupta, 'Increasing Disenfranchisement of Developing Country

Negotiators in a Multi-Speed World', in *The Politics of Participation in Sustainable Development Governance* (Jessica F. Green and W. Bradnee Chambers, Eds, United Nations University, 2006), p 21.

38 These trading blocs are generally intended to strengthen the groupings to better cope with the other groupings. In the course of time, this also became a tool for developing countries to cope with the groupings of industrialized countries and with globalization. See also generally, Mccann, *supra* note 7, p 292; Shah M. Tarzi, 'International Norms, Trade, and Human Rights: A Perspective on Norm Conformity', in 27 *Journal of Social, Political and Economic Studies* 198 (Summer 2002); and Upendra Baxi, *The Future of Human Rights* (Oxford 2006, 2nd edition), p 247.

39 In general terms, 'beggar thy neighbor' policies relate to economic measures taken by one country to improve its domestic economic conditions (normally to reduce unemployment) which have adverse effects on other economies. In such context, a country may increase domestic employment by increasing exports or reducing imports by, for example, devaluing its currency or applying tariffs, quotas, or export subsidies. The benefit which the country attains is at the expense of some other country which experiences lower exports or increased imports and a consequent lower level of employment. Such a country may then be forced to retaliate with a similar measure.

40 An 'executive agreement' in form (or a simplified agreement), the GATT was supposed to be applied provisionally only till the ratification of the Havana Charter. The Charter was to create an International Trade Organization but it could not come into force. GATT, on the other hand, became definitive and was transformed into a real international institution, uniting a group of States controlling more than 85 percent of the total international trade. Actually, the GATT was nothing but a condensed form of the Havana Charter. The IVth Part of the Charter dealing with 'commercial policy' was reproduced under the GATT name.

41 See Clawsen, 'Statement to the UNCTAD VI', Belgrade, 1983.

42 The Havana Charter, which could not enter into force, contained a chapter on basic (primary) products; see also Shah M. Tarzi, 'International Norms, Trade, and Human Rights: A Perspective on Norm Conformity', *supra* note 38, pp 197-198; see also generally, Kym Anderson, Will Martin, and Dominique van de Mensbrugghe, 'Doha Merchandise Trade Reform: What is at Stake for Developing Countries?', *The World Bank Economic Review* (Vol. 20, 2006, No. 2), p 170 (suggesting that most of the potential gains form multilateral reform would come from agriculture) and p 171 (alluding to the acrimony between developed and developing countries).

43 See Clawsen, *supra* note 41.

[44] For a brief discussion on the questionable equity of international trade rules, see also Abdulqawi A. Yusuf, 'Developing countries and the multilateral trade rules: The continuing quest for 'an equitable playing field', in *The International Legal System in Quest of Equity and Universality,* Liber amicorum Georges Abi-Saab (Laurence Boisson de Chazournes and Vera Gowlland-Debbas, Eds, 2002) pp 389-409. See also John W. Foster, 'In Tension: Enfranchising initiatives in the face of aggressive marginalization', in *The Politics of Participation in Sustainable Development Governance* (Jessica F. Green and W. Bradnee Chambers, Eds) (United Nations University, 2006), pp 42-44 (discussing the ceding of sovereignty as an overall problematique for the international system). The US, for instance, contends that its fiscal and monetary policies are no one else's business. This politics in trade has also weakened multilateralism in trade and finance. See Bishwambher Pyakuryal, 'Politics in Trade: Myth or Reality', *The Himalayan Times* (July 11, 2005).

[45] However, in September 2003, the WTO ministerial conference held in Cancun, Mexico, which was intended to take forward the Doha commitments, collapsed without agreement on any agenda items. Divisions, there, were especially bitter on agriculture, which had been excluded from WTO rules at great cost to farmers from developing countries, who were unable to access Western markets. As a result, several developing countries (including, inter alia, Brazil, China, India, and Nigeria) formed a group to put pressure on the US and the EU to end their massive subsidies which they grant to agricultural sectors. See generally, Philippe Sands, *Lawless World* (Viking, 2005), p 107; see also Stiglitz, *supra* note 22, p 74 (noting that whatever standard one uses, today's international trading regime is unfair to developing countries). It may be added that the same tension prevailed during the Conference in Hong Kong in 2006.

[46] See, for instance, Damian Chalmers, 'The Multifibre Arrangement: Ripping the Shirt off the Poor Man's Back?', in *International Economic Law and Developing States. An Introduction* (Hazel Fox, Ed., London: British Institute of International and Comparative Law, 1992), pp 193-216.

[47] See Sands, *Lawless World, supra* note 45, p 106.

[48] It may be noted that the Medicines Act introduced three important measures:

(1) Generic substitution of off-patent medicines and medicines imported and produced under compulsory licenses: The generic substitution measure compels pharmacists to prescribe a cheaper generic version of a medicine, if one exists, when presented with a prescription from a patient. Generic substitution does not apply to medicines under patent, unless a compulsory license has been granted for a generic. In that case, the Patent Act (TRIPs compliant), containing provisions for

obtaining compulsory licenses, will have to be used in order to ensure substantial, sustainable price reductions of anti-retrovirals and other essential medicines under patent.

(2) Parallel importation of patented medicines: The parallel importation measure, the source of most of the confusion surrounding the Medicines Act, refers to the purchasing of patented medicines from foreign countries. It is based on the principle that once a product is sold, the seller loses all ownership rights over it. Parallel importation does not refer to purchasing generic versions of patented drugs; a compulsory license is required to do that.

(3) Pricing Committee and International Tendering System: Pharmaceutical companies will have to justify the prices they charge. The pricing committee can recommend that the Health Minister make regulations on the introduction of a transparent pricing system for all medicines. Drug companies will be allowed to set a single exit price for any medicine, meaning that pharmacies will not be allowed to charge an amount higher than the exit price. Instead, the Pricing Committee will recommend a dispensing fee that pharmacists can charge instead of a markup.

In this context, see also generally, Sands, *supra* note 45, p106. See also Baxi, *supra* note 38, p 247 (discussing some controversies that engulf trade relations between the EU and the US, such as the banana dispute or the Burton Holmes Law that empowers the US to impose trade retaliatory sanctions for European corporations that dare to do business with Cuba, or the regulation of genetically mutated foods, which are all aspects of intra-global capitalist conflicts).

[49] See also Surinder Kaur Verma, 'Trade in Services, World Trade Organization and India', in *India and International Law* (Bimal N. Patel, Ed., Martinus Nijhoff, 2005), *supra* note 4, p 86.

[50] See Ratnakar Adhikari et al, *Seed of Monopoly. Impact of Trips Agreement on Nepal* (Actionaid/Pro-Public, 2000), p 8, citing Michael Baratt Brown (1998), 'Winners and Losers in Globalization – A Post-GATT Analysis', in Eva Haxton and Claes Olsson (Eds.), *WTO as a Conceptual Frame for Globalization.* Also see generally, Peter Harrold, *The Impact of the Uruguay Round on Africa,* World Bank Discussion Papers 311 (1995, Washington, D.C.).

[51] J. P. Therien, 'The Crisis of International Development: Economic Aspects and Normative Issues'. Essay published by UNCTAD, 1986.

[52] See *supra* note 40.

[53] Since its creation in 1960, OPEC constituent documents have been amended many times through different resolutions adopted by its members. However, the initial philosophy remains unchanged. Unlike in the past, since the 1973 October War, OPEC has been fixing

unilaterally the price of petroleum without negotiation with companies. Although recent trends show difficulties in obtaining consensus, OPEC went through a phase of great success for the member countries in the seventies and obtained a considerable price hike. But after 1982, these prices were not maintained, especially, due to lack of discipline amongst its members (or unity in decision-making), indispensable condition for obtaining success in a producers' association, caused by political externalities, often maneuvered by outside interests. Also, the upsurge in oil prices due to supply constraints masks the real effectiveness of OPEC.

54 Globalization has been described to refer to the increasing interdependence of the countries of the world and the integration of domestic economies with the world economy which, in a sense, is manifested in the rising share of international trade in world output and in capital mobility which is depicted by the current wave of liberalization of the economy. See Egbewolf, *supra* note 7, p 333 (citing Victor A. Odozi). Also, in addition to being used in conjunction with economic liberalization, globalization has a broader resonance toward interconnection, or as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa. See, for instance, Bryan Mabee, 'Discourses of empire: the US empire, globalization and international relations', in 25 *Third World Quarterly* (2004), p 1365 (also citing A Giddens, *The Consequences of Modernity*, Cambridge: Polity 1990, p 64). But herein is obvious the paradox: globalization has also incited regionalization. The European Union is one such example. Other organizations, although less integrated from a juridical standpoint, such as the APEC, the ASEAN, the ECOWAS, the MERCOSUR, the NAFTA, or the SAFTA, are also examples of regionalization. One of the main objectives of these organizations is liberalization of markets and expansion of trade exchanges, but within a limited geographical area.

55 Because of this, many are in favor of limiting the TNCs' role in global decision-making. Those in favor of limiting the entrance of TNCs consider them responsible for many vices, albeit not always with unequivocal evidence. Such skeptics consider the TNCs as: (i) threatening national security; (ii) using their power to change governments (e.g., the United Fruits Company's role in the Central and Latin America); (iii) influencing governments to open markets in other countries (e.g., Motorola's influence on US Government in securing market share of Japan for Celltells); (iv) threatening to shift operations if the governments do not change policies; (v) contaminating the environments; (vi) holding 97% of the world's patents; and (vii) threaten-

ing competition (e.g., the EU allowed the raid of Coca Cola in Austria, Denmark, Germany, and the UK to investigate whether the company unlawfully forced retailers into stocking products over those of rivals). See Saman Kalegama, 'Globalization: South Asian Experience', in *Globalization: South Asian Perspective, supra* note 35, p 12.

56 For an interesting discussion, see Shin-Ichi Ago, 'A Crossroad in International Protection of Human Rights and International Trade: Is the Social Clause a Relevant Concept?' in *Melanges En L'honneur De Nicolas Valticos. Droit Et Justice* (Paris: Pedone, 1999), pp 539-548.

57 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria. Reference for a preliminary ruling: Tribunal Superior de Justicia de Cantabria - Spain. (Case C-369/90) European Court reports 1992. Indeed, by order of 1 December 1990, the Tribunal Superior de Justicia (High Court) of Cantabria in Spain referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 3(c), 7, 52, 53, and 56 of the EEC Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. The question was raised in proceedings between Mario Vicente Micheletti and the Delegación del Gobierno (Regional Office of the Ministry of the Interior), Cantabria.

Micheletti had a dual (Argentine and Italian) nationality. The Italian nationality had been acquired in accordance with Article 1 of Law No 555. of 13 June 1912, which, as amended by Article 5 of Law No. 123 of 21 April 1983, provided that the child of an Italian mother or father is an Italian citizen. On 13 January 1989, the Spanish Ministry of Education and Science officially recognized Micheletti's university degree in dentistry under a cultural cooperation agreement between Spain and Argentina. On 3 March 1989, Micheletti applied to the Spanish authorities for a temporary Community residence card, submitting for that purpose a valid Italian passport issued by the Italian Consulate in Rosario, Argentina. On 23 March 1989, the Spanish authorities issued the card requested, which was valid for a period of six months.

Before the expiry of that period, Mr. Micheletti applied to the Spanish authorities for a permanent residence card as a European Community national in order to set himself up as a dentist in Spain. That application and a subsequent administrative appeal were dismissed, whereupon he brought proceedings before the national court for the annulment of the Spanish authorities' decision, recognition of his right to obtain a Community national's residence card enabling him to practice as a dentist, and the issue of residence cards for the members of his

family. The Spanish authorities' decision was based on Article 9 of the Spanish Civil Code, according to which, in cases of dual nationality where neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence (that being Argentine nationality in the case of the plaintiff). The national court, considering that the solution of the dispute called for an interpretation of Community law, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"May Articles 3(c), 7, 52, 53 and 56 of the EEC Treaty, and Directive 73/148 and the relevant provisions of secondary law on the free movement of persons and freedom of establishment be interpreted as being compatible and thus as allowing the application of domestic legislation which does not recognize the 'Community rights' inherent in a person's status as a national of another Member State of the EEC merely because that person simultaneously possesses the nationality of a non-member country and that country was the place of his habitual residence, his last residence or his actual residence?"

58 During the hearing, the Advocate General argued: "I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a "romantic period" of international relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) Nottebohm judgment of the International Court of Justice .... As is well known, in that judgment the International Court of Justice applied the concept of effective nationality in establishing whether the only State of which Nottebohm was a national had a right to exercise diplomatic protection, stating that in the circumstances of the case there was no genuine connection with the State (Liechtenstein) which had conferred that nationality upon him, of any relevance. Nor, above all, is it necessary, in my opinion, to view the problem in terms of a choice of the applicable law from the standpoint of private international law." See Opinion of Mr. Advocate General Tesauro delivered on 30 January 1992. See also for discussions, Pierre-Marie Dupuy, 'Sur le maintien ou la disparition de l'unité de l'ordre juridique international', in *Harmonie Et Contradiction En Droit International,* Colloquium, April 1996 (Pedone, 1996), pp 35-36; see also Leo F. Zwaak and Therese Cachia, 'The European Court of Human Rights : A success Story?' in *Human Rights Brief* (10th Anniversary), Vol. 11 (2004) (Center for Human Right and Humanitarian Law, American University), pp 32-35.

59 It must be noted that the provisions of Community Law concerning freedom of establishment preclude a Member State from withholding

that freedom from a national of another Member State who at the same time possesses the nationality of a non-member country, on the ground that the legislation of the host State deems him to be a national of the non-member country. Whenever a Member State, having due regard to Community law, has granted its nationality to a person, another Member State may not, by imposing an additional condition for its recognition, restrict the effects of the grant of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty, particularly since the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.

The Spanish court's question sought essentially to determine whether the provisions of Community Law concerning freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country. In answering that question, the CJCE bore in mind that Article 52 of the Treaty grants freedom of establishment to persons who are 'nationals of a Member State'. Under international law, it is for each Member State, having due regard to Community Law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State. That conclusion is reinforced by the fact that the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.

The CJCE further noted that in keeping with that interpretation, Directive 73/148 provides that Member States are to grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport (Article 3) and are to issue a residence card or permit to such persons, and to those mentioned in Article 4, upon production, in particular, of the document

with which they entered their territory (Article 6).

Thus, once the persons concerned have produced one of the documents mentioned in Directive 73/148 in order to establish their status as nationals of a Member State, the other Member States are not entitled to challenge that status on the ground that the persons concerned might also have the nationality of a non-member country which, under the legislation of the host Member State, overrides that of the Member State.

On those grounds, the CJCE ruled that the provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country. See the Micheletti Case, *supra* note 57.

60 For a detailed and interesting analysis, see Rafaa Ben Achour, 'La souveraineté des Etats: Harmonie et Contradiction', in *Harmonie Et Contradiction En Droit International,* Colloquium April 1996 (Pedone, 1996), pp 97-124. In this context, another scholar noted that gradually the awareness of international judges and arbitrators will become general on "how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of sovereignty" and that it is an undeniable fact that the recent tendency of promoting "common welfare of the international community" has meant "a corresponding restriction of the sovereign power of individual States" (North America Dredging Company of Texas case, US V Mexico, 1970:633; Reservations to the Convention on Genocide, 1951:46; United Nations, 1949:39). See Werner Levi, *Law and Politics in the International Society* (Sage, 1976), p 43.

61 In the past, China, for instance, experienced the system of extraterritoriality. It meant the creation of enclaves for Europeans within China in which Chinese law was not applied and the law of home states of the Europeans was used instead. See, e.g., Sornarajah, *supra* note 9, p 284. Similar experiences have been shared by many other countries, including Thailand and Germany (Berlin).

62 For an interesting discussion over jurisdictional issues related to human rights, see Darren Hawkins, 'Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality', in 9 *Global Governance* (2003), pp 347-365; see also Mireille Delmas-Marty, *Global Law. A Triple Challenge* (translated by Naomi Norberg, Tansnational Publishers, 2003), p 4.

63 See generally, Delmas-Marty, *Global Law. A Triple Challenge, supra* note 62, p 7.

64 For a brief discussion, see Prakash Loungani and Assaf Razin, 'How Beneficial is FDI for Developing Countries', in *Finance and Development* (Vol. 38, No. 2, June 2001), IMF, pp 6-9. See also Anghie (*supra* note 32), according to whom, the pressures of globalization require the post-colonial state to respond to a number of complex and contradictory demands. It is compelled to create the conditions that enable globalization to further itself, by commercial law reforms, by creating favorable investment climates, by privatizing, and so forth. Also, developing countries are pressured to allow complete currency convertibility in order to enable portfolio capital to move in and out of countries with little restriction. Id., p 256. See also id., p 274 (noting that crisis-ridden Asian countries, desperate to attract the money necessary to address their liquidity problems, have been compelled to make significant concessions). For a slightly different view, see also 'Globalization with a third-world face', in *The Economist* (April 9, 2005), which notes that developing countries are attracting increasing amounts of foreign direct investment from each other, and also that Chinese are considered the new resource colonialists in Africa. See also generally, A. Gunzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining The Popularity of Bilateral Investment Treaties' (1998) *Va. JIL* 639.

65 For specific discussion, see generally, John Hewko, 'Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?' in *CEPMLP,* Internet Journal, Vol. 11, article No. 9. Also relevant in this context is what an African jurist, Ali-saabi noted long ago. For him, "treaties have been used to sanctify subjugation and exploitation of the smaller and weaker states. They have moreover been used to impose protection and to exploit economic privileges." See 'Newly Independent States and Rules of International Law', 1 *Howard Law Journal* (1962), p 168.

66 See also, generally, Monshipouri, *supra* note 11, p 39.

67 See generally, Delmas-Marty, *Global Law: A Triple Challenge, supra* note 62, p 6.

68 For instance, many scholars believe that "a multiplicity of tribunals, lacking in hierarchy and sparse in any formal structure of relationship" is a recipe for conflict, illegitimacy, and fragmentation. See Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', in 15 *Leiden JIL* (2002) p 485. See also, generally, Marttii Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' in 15 *Leiden JIL* (2002), p 553.

69 See generally, Delmas-Marty, *Global Law. A Triple Challenge, supra* note 62, p 11. See also Shah M. Tarzi, 'International Norms, Trade, and Human Rights: A Perspective on Norm Conformity', *supra* note 38, p 194.

70 The Commission was appointed in 1946 with Mrs. Eleanor Roosevelt as chair. The Commission spent two years in discussing how to put into words the great principles of the Declaration. The Universal Declaration was finally adopted by the UNGA without dissenting vote on December 10, 1948. See David Cushman Coyle, *The United Nations and How It Works* (New American Library, 1969), p 80. In this context, a scholar has noted that globalization poses a threat to basic rights, which comes from a particular way of giving priority to some basic rights as compared to others. See, for instance, Sheldon Leader, 'Collateralism', in *Global Governance and the Quest for Justice, Vol. 4 Human Rights* (Roger Brownsword, Ed., Hart Publishing, USA, 2004), p 66. That the UN Declaration was dominated by the Western tradition was also a principal conclusion of a workshop organized at Oxford. According to it, *"La Déclaration universelle a été fortement influencée par la tradition occidentale des droits de l'homme et notamment par les déclarations des droits qui furent proclamées en Europe occidentales et aux Etats unis. La forme et la terminologie de la Déclaration universelle, la place accordée en son sein aux droits civils et politiques et aussi aux garanties de ces droits témoignent de cette influence. On a pu penser aussi que la Déclaration universelle serait fortement "occidentale" dans la mesure ou les normes qu'elle énonce ne reflètent pas toujours celles de certaines philosophies ou religions ou traditions. Si en effet les religions nées dans le bassin méditeranéen peuvent être, elles aussi, regardées a beaucoup d'égards comme les inspiratrices plus ou moins lointaines de la Déclaration universelle, d'autres philosophies, religions et traditions peuvent sembler n'avoir que des rapports assez lâches avec elle; parfois même elles reposent sur des valeurs sinon opposées du moins différentes".* See Hanna Saba, 'La Charte Internationale Des Droits De l'Homme, Son Elaboration Et Son Application Dans Un Monde Multiculturel', in *The Future of International Law in a Multicultural World* (René-Jean Dupuy, Ed., Workshop, The Hague, 17-19 November 1983, Hague Academy of International Law, Martinus Nijhoff, 1984), p 331.

71 Pressed by the spirit of universality, many countries in the world include provisions about economic equity in their constitutions, but often time, for most developing countries, such rights remain in paper, as their economy cannot practically sustain it. See also, for instance, *infra*.

72 The European Court of Human Rights provides an interesting example with its jurisdiction to not only monitor the respect for civil and political rights, but also to indirectly extend its protection to economic, social and cultural rights, for instance, through the right to fair trial or through the principle of non-discrimination which the Court applied to certain social rights.

73 See, for instance, Sonia Picado, 'The Evolution of Democracy and Human Right in Latin America', in *Human Rights Brief* (10th Anniversary, Vol. 11, 2004, Center for Human Right and Humanitarian Law, American University), pp 28-31.

74 The Déclaration des droits de l'homme et du citoyen of August 26, 1789, was later incorporated in the Constitution of 1791. See *Les Constitutions de la France Depuis 1789* (GF-Flammarion Paris, 1979).

75 Interestingly, as noted by a scholar, in the 16th century, Spain redefined basic concepts of justice and universality so as to justify the conquest of indigenous Americans. In the 18th century, France developed the modern concept of borders, and the balance of power, to suit its principally continental strengths. In the 19th century, Britain forged new rules on piracy, neutrality, and colonialism, again, to suit its particular interests as the predominant power of the time. See Michael Byers, 'The Complexities of Foundational Change', in *United States Hegemony and the Foundations of International Law*; *supra* note 12, p 1.

76 See B. K. Nehru, 'Western Democracy and the Third World', in 1 *Third World Quarterly* (1979), p 54.

77 Such behaviors are more frequent when States have to deal with crises. For a brief overview of the series of human rights violations in South Asia in situations of several recent conflicts, see Bishwambher Pyakuryal and Kishor Uprety, 'Economic and Legal Impact of Conflict on States & People in South Asia with Specific Reference to Nepal', in 30 *The Journal of Social, Political and Economic Studies* (Council for Social and Economic studies, Washington, D.C., Winter 2005), pp 459-496. In this context, see also Baxi, *supra* note 38, Chapter 4 on The Logics of Exclusion and Inclusion, and Chapter 5 on Human Rights Language and Powers of Governance, pp 44-47.

78 In this context, see Philip Alston, The Relevance of Law to World Hunger, in *The Right to Food: From Soft to Hard Law*, Report of the international conference organized by Netherlands Institute of Human Rights (SIM) (SIM 1984), pp 7-15. Interestingly a commentator was also found to note: "It's only in Africa that foreigners believe that they are enriching us by donating a cow, a goat, or some chickens and a plough." See Stella Orakwue, 'The Chimera of Equality', in *New African* (August/September 2007, No. 465), p 56.

79 Romanes Lecture, Oxford, 11 November 1997.

80 See Louise Arbour, 'Using Human Rights to Reduce Poverty', in *Development Outreach, Human Right and Development* (World Bank, October 2006), p 7.

81 See, for detail, Polly Vizard, *Poverty And Human Rights. Sen's Perspective Explored* (Oxford University Press 2006), p 81. It may be appropriately added that in a case involving children's rights to minimum shelter, the Constitutional Court held that the realization of socio-economic rights, including access to housing, health care, sufficient food and

water, and social security, is necessary to ensure human dignity, freedom and equality of all individuals. The failure of the government to make any provision at all for the housing needs of the poorest was a violation of the South African constitution (*Government of the Republic of South Africa and Others v Grootboom*, 2001 [1] SA 46 [CC], 2000 [11] BCLR 1169 [CC].) Similarly, in another case, the Constitutional Court directed the government to provide HIV treatments to reduce mother-to-child transmission, leading to the development of one of the largest mother-to-child treatment programs in the world and saving potentially thousands of lives (*Treatment Action Campaign & Ors. v Minister of Health & Ors*). See Louise Arbour, 'Using Human Rights to Reduce Poverty', *supra* note 80, p 6.

82 In Part IV, Directive principles of state policy. It may be added that, according to a Judge of the Indian Supreme Court, the central theme of the Constitution of India is justice, which is evident from the preamble that speaks of justice, social, economic and political. See A.M. Ahmadi, 'Access to Justice in India', *Asian Law Review*, Vol. 1991, p 60.

83 See Art. 38.

84 See generally, Art. 39. It may be worth noting that the idea that the human right to life can give rise to positive obligations is also reflected in an expanding body of domestic case law. For instance, the Supreme Court of India has interpreted the right to life under article 21 of the Indian Constitution so as to impose positive obligations on the state in relation to the basic needs of its inhabitants, invoking the human right to life a basis for the protection and promotion of economic and social policy under the Indian Constitution. Moreover, in the *Paschim Bangal Khet Mazdoor Samitee and others Vs the State of West Bengal,* the Supreme Court reasoned that Article 21 imposed an obligation on the State to safeguard the right to life of every person and that failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment resulted in violation of his right to life guaranteed by the Constitution. The Indian Supreme Court has also issued landmark judgments on many other cases touching upon the notion of right to life and linking it with the safeguard of human rights, or acknowledging that human right to food derived from the human right to life.

85 See also generally, Declaration on the Right to Development (UNGA Res.41/128) December 4, 1986. The text of the Declaration is reproduced in Appendix. It is appropriate to note that in the early 1970s already the "right to development" was officially proposed as a human right, but the UN General Assembly proclaimed it as such only in 1986, in the Declaration on the Right to Development. The United States cast the only negative vote; eight other countries abstained. The

UN High Commissioner for Human Rights established a branch within the secretariat with responsibilities for its promotion and protection; the 1993 World Conference on Human Rights called it "a universal and inalienable right and an integral part of fundamental human rights;" and the heads of state and government meeting at the 2000 Millennium Summit committed themselves "to making the right to development a reality for all." It was even mentioned in the 2002 Monterrey Consensus on financing for development and the 2005 Summit Outcome. See Stephen P. Marks, 'Misconceptions About the Right to Development', in *Development Outreach, Human Right and Development* (World Bank, October 2006), p 9.

86 For a more detailed analysis, see generally, Manoj Kumar Sinha, 'Laws of Human Rights and the Indian Constitution', in *India and International Law, supra* note 4, pp 141-174.

87 See generally, for detail, Articles 33-36 of the Interim Constitution 1963.

88 Constitution as modified up to 30th April, 1996. Fundamental Principles of State Policy, Art. 15, Part II.

89 Chapter 2, Principles of Policy.

90 See article 38.

91 See also *infra.* It is interesting to note that the September 2000 Millennium Development Goals (MDGs), signed at the Millennium Summit at the UN, recognized the many dimensions to poverty, not just inadequate income, but also, for instance, health care and access to water. See Stiglitz, *supra* note 22, p 14. It may also be added that courts in Argentina have on several occasions held that constitutional provisions on the right to health include an obligation to ensure access to essential medicines, decisions with major human development dividends *(Viceconte, Mariela v Estado Nacional-Ministerio de Salud y Ministerio de Economía de la Nación* [1998]). Similarly, in the case of *International Commission of Jurists v Portugal,* Complaint No. 1/1998, the European Commission for Social Rights found that Portugal's failure to enforce its child labor legislation constituted a breach of its obligations under the European Social Charter. In response to this, Portugal implemented a set of legislative and policy reforms and strengthened the working methods of its Labor Inspectorate, which in the assessment of the European Trade Union Council has had a major impact on the child labor problem (Governmental Committee 2001). See Louise Arbour, *Using Human Rights to Reduce Poverty, supra* note 80, p 6. Actually, the most important element in considering whether a right has become claimable right is the element of justiciability. But justiciability is not a panacea, and should be considered as a means to advance the rights, taking into account advantages and disadvantages vis-à-vis other potential strate-

gies for exigibility, such as mobilization, political negotiation, civil society participation in the formulation, implementation and monitoring of public policies. But justiciability should not be underestimated either. The right to food, for instance, has multiple aspects or components, most of them offer possibilities for judicial protection, both directly and indirectly. Courts throughout the world have dealt with a range of different claims related to the right to food, sometimes directly invoking this right, sometimes framing violations to duties, stemming from the right to food as violations of other rights, such as inter alia, the right to life, the right to a vital minimum, the respect for human dignity, the right to health, the right to an income, the right to land, the respect for ethnic and cultural rights, the right to housing and consumer rights. See for an interesting discussion, Christian Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies', in *Max Planck Yearbook of United Nations Law* (Vol. 11, 2007, Martinus Nijhoff), pp 317-337.

92 In fact, as noted by a scholar, a law of indiscriminate profit is being globalized, and by its application, all too many corporations contribute to the abuse of human rights in poor countries. See David Batson, A Model of Fairness in Global Trade, in [http Right reality (visited May 4, 2005)]. As a matter of fact, events over the past five decades demonstrate that there is little corporate accountability for human rights abuses. Although, since World War II, the international community has developed a body of international human rights norms, also applicable to corporations, the transnational corporations continue to argue that they are neutral entities engaged in the pursuit of profit. Also, although the international norms are in place, corporations are able to evade responsibility due to the lack of an international enforcement mechanism. Domestic enforcements of these norms, a possibility indeed, have only been sporadic, as host countries are often unable to enforce them against transnational corporations that have more political and economic clout, and home countries, such as the U.S., selectively enforce norms related to business practices only, but not those related to human rights abuses. Moreover, transnational corporations can take advantage of differing domestic standards and evade regulation by transferring their operations to countries with weaker standards. Multiple layers of control and ownership further enable corporations to evade responsibility. Clearly, human rights abuses are not necessarily an inevitable result of economic development. With regulation of multinational corporations by means of a coordinated approach between international and domestic legal systems, corrective measures could be designed and implemented. For a detailed analysis of the problems of human

rights with reference to transnational corporations, see generally, Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights', 20 *Berkeley Journal of International Law* (2002), pp 45-90.

93 Where the violation of these codes would be considered a reason for immediate termination of a contract for just motive.

94 The legislation on unfair competition may be applied to enterprises that contravene these codes.

95 See William J. Bruce, 'The United States and the Law of Mankind: Some inconsistencies in American Observance of the Rule of Law', in *Power and Law: American Dilemma in World Affairs* (Charles A. Baker, Ed., Johns Hopkins, 1970), p 85. See also Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', 47 *Harv JIL* (2006), p 327.

96 Many scholars have agreed that law is the result of power. Therefore, naturally big powers are more law-abiding than less powerful states: they have the means to elaborate and impose on the rest of the world the legal rules which best serve their interests. See comment by Alain Pellet, in *United States Hegemony, supra* note 12, p 421. Also, as noted by Stiglitz, there is now consensus, at least outside of the US, that something is wrong with the way decisions are made at the global level; there is a consensus on the dangers of unilateralism and on the "democracy deficit" in the international economic institutions. Both by structure and process, voices that ought to be heard are not. Colonialism is dead, yet the developing countries do not have the representation that they should. See Stiglitz, *supra* note 22, pp 17-18.

Interestingly, a scholar has noted a few obstacles encountered by developing country delegates in international forums. They include small or one person delegations, lack of knowledge of English language, lack of funds to travel to meetings, lack of experience on multilateral negotiations, lack of technical knowledge about issues being discussed, lack of expert knowledge, and so forth. See Jessica F. Green and W. Bradnee Chambers, 'Introduction: Understanding The Challenges to Enfranchisement', in *The Politics of Participation in Sustainable Development Governance* (Jessica F. Green and W. Bradnee Chambers, Eds (United Nations University, 2006), pp 8-9.

97 Charles A. Baker, 'Another American Dilemma: Multilateral Authority Versus Unilateral Power', in *Power and Law: American Dilemma In World Affairs* (Charles A. Baker, Ed., Johns Hopkins, 1970), p 3.

98 Id.

99 See *supra* note 29. In this context, it may also be noted that the principle of sovereign equality, de facto, is a legal fiction. See Pierre Marie Dupuy, 'Comment', in *United States Hegemony, supra* note 12, p 178.

[100] According to another scholar, the UN Charter is an illusionary written constitution of international society which was and is merely the groundwork of an international oligarchy of oligarchies. See for instance, Allott, *supra* note 19, p 336. See also Thomas Lee, *supra* note 3. For an interesting discussion, *see* also Muchkund Dubey, *Multilateralism Besieged,* 45 IJIL (Apr-Jun 2005), pp 215-242. See also, for some discussions, Ernst-Ulrich Petersmann, 'How to Reform the United System? Constitutionalism, International Law, and International Organization', in *Leiden J. of Int'l Law* (1997), pp 421-474.

[101] See generally, Dominique Carreau, Thiebaut Flory, and Patrick Juillard, *Droit International Economique,* (LGDJ, 1990).

[102] For an interesting discussion about the universality of international law, particularly in connection with the procedures and practice of the International Court of Justice, see Kurt Taylor Gaubatz and Matthew MacArthur, 'How International is International Law?' in 22 *Michigan Journal of International Law* (Winter 2001), pp 239-282.

[103] The NIEO was outlined at the 1964 UNCTAD by various declarations and was more comprehensively formulated in: Declaration on the Establishment of a New International Economic Order, GA Res. 3201(S-VI), UNGAOR, 6th special session, 2229th Plen. Mtg, Supp 1, UN Doc A/9599 (1974); Program of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-V2), UNGAOR, 2229th Plen. Mtg, Supp. 1, UN Doc A9599 (1974); Charter of Economic Rights and Duties of States, GA Res. 3281 (XXXIX), UNGAOR, 29th Sess, 2315th Plen. Mtg, Supp 31, UN Doc. A/RES/3281 (XXIX) (1975). See also the Boumedienne speech on NIEO.

[104] See generally, for detail, New International Economic Order, by Robert Looney, Prepared for R.J.B. Jones, Ed., *Routledge Encyclopedia of International Political Economy* (London: Routledge, 1999); see also, Gillian White, 'The NIEO: Principles and Trends', in *International Economic Law and Developing States, supra* note 46, pp 27-57. See also Raja Venkataramani, 'Towards reform of the international financial and trading systems. Help for less developed countries: equitable benefits for all', in *Towards Reform of the International Financial and Trading Systems, In Their Mutual Relationships. With Special Emphasis on the Interests of the Developing Countries.* United Nations (New York, 1986), pp 1-12.

[105] Where they clearly held the balance of power.

[106] See generally, for detail, New International Economic Order, by Robert Looney, *supra* note 104.

[107] Id.

[108] It is worth noting that, in the international fora, successes have been relatively easier when groups of countries with similar demands have joined forces. The developing countries in the context of trade and

finance, landlocked countries in the context of right of transit passage and access to the sea, and lower (or upper) riparian countries in the context of non-navigational uses of international waters, are some of the interesting examples confirming the above observation.

[109] See *supra* note 103.

[110] For details on NIEO, see generally Mohammed Bedjaoui, *Towards a New International Economic Order* (UNESCO, 1979). See also, Mario Bettati, *Le Nouvel Ordre Economique International* (PUF, 1983). See also generally, Milan Bulazic, *Principles of International Development Law* (Martinus Nijhoff, 1986).

[111] These terms come from the socialist-Marxist literature that consider as exploitation commercial activities in which business firms retain any part of net revenue as profits or return to invested capital rather than paying it all in the form of wages to labor employed by the firm. This proposition follows directly from the Marxist proposition that any net income, not going to wages, is surplus value. Under colonialism, the instruments of exploitation were the colonial administration and under the neo-colonialism, they are the modern multinational enterprises.

[112] In the context of sovereignty over natural resources, some international law authorities have questioned the obligatory character of the Charter. For instance, for the Late R. J. Dupuy, Article 2 of the Charter is "a political rather than juridical declaration, involving an ideological strategy for development and as such, supported only by non-industrialized countries". See for instance, Texaco v. Libyan Government, 17 ILM (1978), para 88. It should also be noted that the legal effect of the Charter has been discussed by many other scholars who generally agree that it does not lay down established rules which have become part of international law. See, for detail, C. F. Amerasinghe, 'Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice', in 41 *ICLQ* (1992), p 35 (note 50).

[113] See Theodore A. Couloumbis and James H. Wolfe, *Introduction to International Relations: Power and Justice* (Prentice Hall 1982), pp 315-316.

[114] For detailed discussion, see generally, Bettati, *supra* note 110. The Charter and the accompanying resolutions were passed by a vote of 120 in favor, 6 against (Belgium, Denmark, FRG, Luxembourg, UK, and USA) and 10 abstentions. See Amerasinghe, *supra* note 112, p 33 (note 47).

[115] See also, for instance, Alhaji B. M. Marong, 'Toward a Normative Consensus against Corruption. Legal Effects of the Principles to Combat Corruption in Africa', 30 *Denv. J. Int'l L. and Pol'y,* p 112 (note 56).

[116] See generally, International Meeting of Experts on the New International Economic Order - Philosophical and Socio-cultural Implications (Vienna, 2-3 April 1979, *Communique*).

[117] See, for example, Bettati, *supra* note 110, p 7.

[118] However, a technique to still contain this power was intelligently devised by the US, through a series of agreements, commonly referred to as the Fahd-Simon Agreement. Indeed, in 1972-74 the US government concluded a series of agreements with Saudi Arabia, known as the U.S.-Saudi Arabian Joint Economic Commission, to provide technical and military assistance to Saudi Arabia in exchange for accepting only US dollars for its oil. Not subjected to an allotted production quota, Saudi Arabia was the 'swing producer', meaning that it could increase or decrease oil production to bring oil drought or glut in the world market. Also it was the largest producer and the leader of OPEC. Through this understanding the Saudi ruling family purchased the security it needed while the US got confirmation of a reliable alliance in the OPEC circle. The US, thus, found ways to successfully recycle petrodollars as well as to maintain hegemony. Soon after the agreement with Saudi government, an OPEC agreement also accepted this arrangement, after which all oil started to be traded in US Dollars. See also generally, David E. Spiro, *The Hidden Hand of American Hegemony: Petrodollar Recycling and International Markets* (Cornell University Press, 1999).

[119] For Bettati, the absence of political will of the North and the diversity and divergence of the South are the principal elements of failure. See Bettati, *supra* note 110, p 124. It is interesting to note that, in view of the extreme position taken by developed as well as developing countries, in favor or against the instruments related to the NIEO, a scholar has categorized the Charter and the Declaration as the "Confrontational Resolutions" (resolutions de confrontation) as opposed to "Planned and Discussed Resolutions" (resolutions de concertation). See, for instance, Alain Pellet, *Le Droit International du Developpement* (PUF, 1978), p 55. See also generally, Edmond Jouve, *Le Tiers Monde Dans la Vie Internationale* (Berger-Levrault, 1983), pp 99-110.

[120] See generally, International Meeting of Experts on the New International Economic Order - Philosophical and Socio-cultural Implications (Vienna, 2-3 April 1979, Communiqué). It may be noted that some of these concerns were even given lip service at Monterey by introduction of the term 'mutual accountability'.

[121] See Bruce, *supra* note 95, p 85. Also, noteworthy in this context is what William Sloane Coffin noted: "All nations make decisions on self-interest and then defend them in the name of morality". Cited in Ian Smillie and Larry Minear, *The Charity of Nations. Humanitarian Action in a Calculating World* (Kumarian Press, 2004), p 135. Similarly, in a general context of humanitarian interventions, Smillie and Minear note that "each donor country has its own foreign policy interests, which are influenced by the behavior and actions of other countries and by do-

mestic policies and politics". See id., p 136. Furthermore, "no government's humanitarian policies are freestanding; instead, they flow from a country's foreign and domestic policies and politics". See id., p 164. Even institutions like the UN have been used to serve the countries' national interests. As noted by another scholar, during the first 25 years of the UN, both superpowers (USSR and US) tried to use the UN as a vehicle for the advancement of their individual, antithetical foreign policy interests. In that quest, the UN has been a more important vehicle for the US than for the USSR, because the US has successfully involved the UN in more activities that have served its national interests. The UN has been persuaded to do collectively what the US might have had to do individually. This has been possible essentially because the objectives of the US policy have been more compatible with the UN Charter than those of the USSR, and because of the fact that, for most of its history, the UN has been controlled politically and financially by the US and its military allies. See, for detailed discussions, John G. Stoessinger, *The United Nations and the Superpowers: China, Russia, and America* (Random House, New York, 4th edition, 1977), Preface, p xvii.

[122] The PCIJ noted: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." See, Permanent Court of International Justice, The Case of the S.S. "Lotus" (France v Turkey), Judgment No. 9. It is interesting to note that the Lotus Case represents the high point of positivism in international law. It was based on two inter-related principles. First, the notion that international law is based on the free will of States thus emphasizes the consent-based nature of international law-making. Second, there is presumption that in the absence of internationally legally binding norms to the contrary, the independence and legal authority of States is largely without restriction. See also Duncan French, 'International Rhetoric and the Real Agenda: Exploring the Tension Between Interdependence and Globalization', in *Global Governance and the Quest for Justice, supra* note 70, p 123.

[123] The legal literature carries three sets of views about resolutions of international organizations: that resolutions are legally binding on states (recommendatory resolutions); that they possess only political and moral significance; and that they contain a certain legal element, although they are not legally binding. In spite of the different views,

scholars have concluded that resolutions of international organizations do not create norms of international law, although, in some instances, they may constitute part of the process of creating such norms, being the first stage of the coordination of the wills of States in this process. See G.I. Tunkin, 'The Role of Resolutions of International Organizations in Creating Norms of International Law', in *International Law and the International System* (William E. Butler, Ed., Martinus Nijhoff, 1987), p 17; for discussions, see also Rosalyn Higgins, 'The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System', in *International Law and the International System* (William E. Butler, Ed., Martinus Nijhoff, 1987), pp 21-45. Also, as important, the question as to whether the international legal order provides an appropriate answer to the fundamental question of distributional justice often raised by the development problem, by the gap between rich and poor countries, remains a relevant one. In that sense, a sweeping solution to that problem by international law cannot be expected. On the other hand, various parts of international economic law provide different elements of an answer, both of a procedural as well as substantive nature. The procedural rules lie in the institutions created for the purpose of promoting development, and are buttressed by the emerging duty to cooperate for the promotion of development. See also for discussions, Michael Bothe, 'Environment, Development, Resources', in *Collected Courses of the Hague Academy of International Law, 2005* (Martinus Nijhoff, 2007), pp 408-409.

124 See Zorgbibe, *supra* note 24, p 8.

125 Id., p 15. In this context, indeed, R. P. Anand noted that "while the traditional international society during the last two centuries and more consisted of a homogenous group of European States, or States of European Origin, with a distinct Western Christian civilization, culture and common values, the new extended world-wide community of States is extremely heterogeneous because of the very different historical, social, ethnic, religious and legal backgrounds of the new members". See *The Future of International Law in a Multicultural World* (Rene-Jean Dupuy, Ed.) (Workshop, The Hague, 17-19 November 1983, Hague Academy of International Law, Martinus Nijhoff, 1984), p 105. It may be useful to add, however, that some political philosophers like James Tully believe that "cultures are not internally homogeneous. They are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others." See, for example, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, p 11 (1995).

126 Levi also noted that the diversity of values or, more generally, the heterogeneity of cultures in the international society has been held

responsible for the ineffectiveness or even the impossibility of international law. See Levi, *supra* note 60, p 135.

127 See Couloumbis and Wolfe, *supra* note 113, p 85. Also it is worth noting that since the times of Machiavelli, the modern thinking has always doubted the juridicality and the efficacy of justice in international law. Machiavelli, Hobbes, Spinoza, Rousseau, Kant, Hegel, Aron or Morgenthau, all have shown some amount of cautiousness on the grant of justice of international law. See, for instance, commentary by Slim Laghmani, 'Faut-il rire du droit international ou le pleurer?' in *Actualite Et Droit International* (http://www.-ridi.org/ adi/articles /2003/ - 200302lag. htm) visited December 24, 2003.

128 See Couloumbis and Wolfe, *supra* note 113, pp 94-95.

129 For a brief discussion, see Shipman, *supra* note 33, pp 74-79.

130 See generally, Susan George, 'More Food, More Hunger', in *Development, Seeds of Change. Village through Global Order* (Rome 1986:1/2), pp 53-63.

131 The side effects of unequal growth can be disturbing. In 85 countries, people are worse off than a decade ago. The per capita income in 40 LDCs is less today than 20 years ago. The poorest 20% in LDCs share of world income declined from 2.3% in 1960 to 1.3% in 1997. Average consumption levels in Africa fell by 20% in the last 25 years. During 1983-1997, the number of malnourished children increased from 5 to 25%. Exports from developing countries increased, but these exports were concentrated amongst a few of them. In fact, 85% of exports came from only 15 developing countries. Foreign direct investments increased but the concentration during the 1990s was among 20 countries, which received 80% of the investment. East Asia accounted for 4% of GDP of FDI in 1997 compared to 0.7% of GDP in South Asia. Clearly the economic integration is dividing the world not only amongst developed and developing but also dividing developing countries into those that are benefiting from global opportunities and those that are not. See Kalegama, *supra* note 55, p 13. See also, William I. Robinson, 'Remapping Development in Light of Globalization: From a Territorial to a Social Cartography', in 23 *Third World Quarterly* (2002), p 1050 (recalling that the 1980s and 1990s saw a heightened process of global social polarization and a crisis of social reproduction. In most countries some sectors of the population experienced notable improvements in living standards. However, the absolute number of the impoverished - of the destitute and near destitute - increased rapidly and the gap between the rich and the poor in global society has widened since the 1970s. Also, while global per capita income tripled over the period 1960-94, there were over 100 countries in the 1990s with per capita incomes lower than in the 1980s, or in some cases, lower than in

the 1970s and 1960s).

[132] See J. Stiglitz, *Globalization and Its Discontents* (London: Allen Lane, 2002), p 248; see also B. K. Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues', in 8 *ICLR* (2006), p 284 (noting that economic globalization values the protection of private property above social welfare policies).

[133] State failure causes a wide range of humanitarian, legal, and security problems. Unsurprisingly, given the state-centric international legal system, responses to state failure tend to focus on restoring 'failed' states to the status of 'successful' states, through a range of short and long-term 'nation building' efforts. See Rosa Ehrenreich Brooks, 'Failed States, or the State as Failure?', 72 *U. Chi. L. Rev.* 1159 (2005).

[134] Since the end of the Cold War, the international community (along with the community of international lawyers) became increasingly preoccupied with the phenomenon usually dubbed 'state failure.' Definitions of the failed state vary, but, unsurprisingly, most commentators define failed states in opposition to the successful states that are presumed to be the norm. Successful states control defined territories and populations, conduct diplomatic relations with other states, monopolize legitimate violence within their territories, and succeed in providing adequate social goods to their populations. Failed states, on the other hand, lose control over the means of violence, cannot create peace or stability for their populations or control their territories, and cannot ensure economic growth or any reasonable distribution of social goods. They are often characterized by massive economic inequities, warlordism, and violent competition for resources. Recent examples of failed states are familiar to us all, from the total collapse of state institutions in Somalia and the disintegration of the former Yugoslavia to the varied crises in Rwanda, Haiti, Liberia, Congo, Sierra Leone, and Afghanistan. One notch higher than failed states are the numerous 'weak' or 'failing' states, which together constitute much of sub-Saharan Africa, significant chunks of central Asia, and parts of Latin America and South Asia. These 'weak' states are tremendously varied, and may in some cases combine fragile governance structures with substantial regional influence and wealth (e.g., Indonesia, Pakistan, and Colombia) but they all teeter in common on the precipice, at seemingly perpetual risk of collapse into devastating civil war or simple anarchy. See Rosa Ehrenreich Brooks, 'Failed States, or the State as Failure?', *supra* note 133, pp 1161-1162.

[135] See, for instance, Castagnera, *supra* note 19, p 302, who, in this connection, cites Leo Tolstoy, Edward Ballamy, and John Ruskin.

[136] See Foreword by Ramesh Singh, in Chris Murgatroyd, *The Law of Development in Nepal* (Action Aid, 1996), p 1. In this context, it is also appropriate to acknowledge the concept of "gross national happiness" (GNH) promoted by the King of Bhutan, which is a political manifesto openly defended in international fora, quite unique in its formulation and implementation. The GNH is more important than GNP. This approach to development is composed of different interrelated policy choices. Central elements are shared cultural understanding expressed in "rules of etiquette", the absence of foreign political and economic domination, and Buddhism as a component of national identity. According to the concept of GNH, the major areas of modernization are economic self-reliance and cultural and environmental preservation and promotion, with the rejection of development doctrines stressing solely quantifiable economic indicators. These goals have also more recently been directly linked to ideas of good governance and accountability, efficiency, and transparency, reflecting the wider language of international development programs. See Alessandro Simoni and Richard W. Whitecross, 'Gross National Happiness and the Heavenly Stream of Justice: Modernization of and Dispute Resolution in the Kingdom of Bhutan', 55 *Am. J. of Comp. Law*, pp 174-175.

[137] See, for instance, Ann Seidman and Robert B. Seidman, 'Drafting Legislation for Development: Lesson from a Chinese Project', 44 *Am. J. Comp. L* (1996), p 34 (noting that the law of non-transferability of law holds that, save accidentally, no country can copy another country's law and achieve similar outcomes. It so argues because all behavior – and therefore all institutions – emerge historically as various actors respond, not only to the law's commands, but also to their environment's unique constraints and resources); See also Daudet who emphasized that codification is linked with the juridical mentality and traditions *(On constate que la codification est très liée aux mentalités et traditions juridiques, voire un style de raisonnement)*. See Yves Daudet, 'Actualites de la codification du droit international', in *Collected Courses of The Hague Academy of International Law* Vol. 303 (Martinus Neijoff, 2004), p 31. It may be recalled that Napoleon gave the Civil Code in 1804 to both France and Haiti. But from a rule of law standpoint, the situation in France and Haiti, after two centuries, is far from being identical. In similar vein, it may be noted that after the independence from the British Raj, both Pakistan and India appointed constituent assemblies to draft their new constitutions. But, although the drafting of the respective constitutions in both the countries had followed similar procedures, in one of them, the violation of the constitutional provisions has been quite frequent a practice, while in the other, the constitution has evolved in a rather positive manner.

[138] W.W. Rostow, *The Stages of Economic Growth* (1960).

[139] See generally, *Encyclopedia of Religions.*

[140] See Bernard Kliksberg, 'Facing the Inequalities of Development: Some lessons from Judaism and Christianity', *SID On-line dialogue. Development* 46:4, 2003; see also generally, *Encyclopedia of Religions.*

[141] See generally, *Encyclopedia of Religions.*

[142] The atomistic society where each individual is seeking happiness will never achieve the holistic definition of freedom. As guidelines for life led by wisdom and compassion, Buddhism uses the four divine abodes of *metta* (loving kindness), *karuna* (compassion), *mudita* (sympathetic joy), and *upekkha* (equanimity).

[143] See generally, *Encyclopedia of Religions.*

[144] See generally, *Encyclopedia of Religions.*

[145] See generally, *Encyclopedia of Religions;* see also generally, Bridget Walker, 'Christianity, development, and women's liberation', 7 *Gender and Development* (No.1, March 1, 1999), pp 15-22.

[146] *Christian Aid* 1970, p 5.

[147] Duremdes S.T., 'Women in Theology: Philippine Perspectives' in 28 *Women in a Changing World* (May 1989, WCC: Geneva), p 38.

[148] See generally, *Encyclopedia of Religions;* see also generally, Vision 1440 Hijrah. A Vision for Human Dignity (Islamic Development Bank, March 2006/ SAFAR 1427), pp 17-19.

[149] See generally, Edward Paul (Ed.) *The Encyclopedia of Philosophy* (New York: Macmillan Publishing Co., 1967), pp 171-173.

[150] Id.

[151] Id.

[152] Id.

[153] In Greek philosophy, justice first was viewed as a metaphysical cosmological principle regulating the operations of the forces of nature. People in Greece under this ideal left the result, good or bad, to destiny. It was Plato who brought the notion of justice into ethical principles involving human conduct. Indeed, social, cultural, and spiritual identity of the areas or peoples, are also relevant in the internalization of the concept of justice. For a brief, yet very interesting, analysis of the South Asian identity, for instance, see generally, Dipak Gyawali, 'Cogito (I'm a South Asian), Ergo Sum!' (*Himal South Asian*, Vol. 13, No. 1, January 2000).

[154] Gandhi sailed for England on September 4th 1888 to study law, kept his terms at the Inner Temple and took all his subjects in one examination after nine months' intensive study. He was called to the bar on 10th June 1891, enrolled to the High Court on the 11th June 1891, and sailed back for India on 12th June 1891. Later his sojourn in South Africa would have a considerable impact on his life and his thinking. See also *infra.*

[155] J. B. Kripalani, *Gandhi: His Life and Thought* (Calcutta: Orient Longmans, 1961), p 252.

[156] With regard to the South African situation, it is relevant to point out that the Dutch preferred their colonies to be exclusively white, with the Africans confined to a specified area allotted to them. They also wanted all Asiatic labor to be brought for a stipulated period and repatriated immediately after the contract came to an end. The local Britishers were also not different, and considering Indians as rivals in agriculture as well as trade, feared that they might be swamped by the Indians if their entrance was not checked. As a result thereof, a number of restrictions in the form of new rules and regulations were coming in the way of the Indians entering into the colonies under the indenture contract. The earliest was the Law 3 of 1885 in Transvaal in flagrant contradiction of Article 14 of London Convention of 1884 (Convention between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the South African Republic), which gave all persons, other than natives, conforming themselves to the laws of the South African Republic (a) full liberty, with their families, to enter, travel or reside in any part of the South African Republic; (b) entitlement to hire or possess houses, manufactories, warehouses, shops, and premises; (c) the right to carry on their commerce either in person or by any agents whom they may think fit to employ; and (d) the guarantee of not being subject, in respect of their persons or property, or in respect of their commerce or industry, to any taxes, whether general or local, other than those which are or may be imposed upon citizens of the South African Republic. But the law, inter alia, required that, for sanitary purposes, Indians should reside in locations specially set apart for them, they should not own fixed property except in such locations, and that such of them as entered for purpose of trade should be registered for a fee and should obtain a license.

[157] M.K. Gandhi, *The Law and the Lawyers* (Ahmedabad: Navajivan Publishing House, 1962), p 13.

[158] See, M.K. Gandhi., *The Story of My Experiments with Truth* (Ahmedabad: Navajivan Publishing House, 1990), p 39.

[159] See Ajit Atri, *Gandhi's View of Legal Justice* (Deep & Deep Publications, 2007), pp 57-58. Briefly put, Parsi Rustomji, a close friend of Gandhi, was an importer of goods from Bombay and Calcutta, who frequently resorted to smuggling. But being on the best terms with customs officials, no one suspected him. However, his illegal acts having been discovered one day, he asked Gandhi for assistance. Indeed, inquiry revealed that the smuggling had been going on for a long time, but the actual offence detected involved a trifling sum. Gandhi and Rustomji went to Rustomji's counsel, who perused the papers and said that "the case would be tried by a jury, and a Natal jury would be the last to acquit an Indian". However, the counsel said, "it was worth a try".

But Gandhi was not in favor of taking the case to the Court. He rather advised Rustomji to admit his mistake and apologize to the authorities, and if the authorities imposed any penalty, to pay it, or if needed, even go to jail. Gandhi stressed that the deed of shame had already been done, and imprisonment, if any, would only be a penance. After persuading Rustomji, Gandhi himself went to apprise the authorities (the Customs Officer and the Attorney General) of the whole affair, and told them how penitent Rustomji was feeling. The authorities appreciated Gandhi's frankness, indeed, but the case against Parsi Rustomji was compromised. He was asked to pay a penalty equal to twice the amount he had confessed to having smuggled.

Rustomji wrote the facts of the whole case in a piece of paper, got the paper framed and hung it up in his office to serve as a perpetual reminder to his heirs and fellow merchants. When Gandhi asked Rustomji about why he was displaying the warning, he said: "What would be my fate if I deceived you?". See, for detail, Gandhi, *The Story of My Experiments with Truth, supra* note 158.

160 See generally, Martha Nussbaum, 'The Enduring Significance of John Rawls', in *The Chronicle Review, The Chronicle of Higher Education, The Chronicle* July 20, 2001, in http//chronicle.comfree/v47/i45 /45b00701 (visited Jan. 22, 2004).

161 See also for comments on Rawls's Theory of Justice, Castagnera, *supra* note 19, pp 302-304.

162 John Rawls, *A Theory of Justice* (Harvard University Press, 1973), p 76.

163 See for an interesting critique, Brian C. Anderson, 'The Antipolitical Philosophy of John Rawls', in *Public Interest*, No. 151 (Spring 2003), pp 39-51; see also generally, Anthony D'Amato, *International Law and Rawls Theory of Justice,* 5 Denver JIL 525 (1975).

164 See generally, Rawls, *supra* note 161. See also Vizard, *supra* note 81, pp 53-54 (discussing the limitations of the Rawlsian framework from the perspective of fundamental freedoms and human rights).

165 See generally, Vizard, *supra* note 81, pp 53-54.

166 See generally, id.

167 It should be noted that before Rawls also, Hannah Arendt's The Origin of Totalitarianism, Raymond Aron's Peace and War, Isaiah Berlin's Essay of Freedom, Friedrich Hayek's The Constitution of Liberty, Bertrand de Jouvenel's Sovereignty, Michael Oakeshott's Rationalism in Politics, and Leo Strauss's Natural Rights and History had, in their political thoughts, already attempted to cover this aspect.

168 Clearly, the law relates in profoundly important ways to philosophical ideas and controversies, mandating the lawyers to have knowledge and understanding of the philosophical implications of law and legal systems. Simultaneously, lawyers have to act as mechanics, who will

make the parts of the legal machine work and when needed, will adjust and replace the machine's components to render it more efficient. The philosophical and mechanical roles the lawyers play have to be able to create synergy, thus using philosophy towards making law practical.

169 See generally, Rawls, *supra* note 162.

170 This is also broadly what Rawls implies in his writings about civil disobedience. See generally, J. Rawls, 'A Theory of Civil Disobedience', in *The Philosophy of Law* (R. M. Dworkin, Ed., Oxford University Press, 1979), pp 89-111. It is also true that there is no a *priori* reason to believe that the rule of law is necessarily always a good thing. Scholars like Stephenson questioned that in the form of an example regarding official discretion. Official discretion is often a bad thing – which is seen as such – the behavior is often called "arbitrary". But sometimes official discretion is a good thing in which cases we tend to think of the behavior as "flexible". But flexibility and arbitrariness may be two sides of the same coin. Whether official discretion is used for good or ill depends on a host of other factors. The rule of law, while often a good thing, can in some case create problems. See Matthew Stephens, 'The Rule of Law as a Goal of Development Policy', http:// www1.world bank. org/public sector/legal/ rule of law2. Let it be noted that in a colloquial sense, the phrase "rule of law" implies a rather vague cluster of concepts: fairness, justice, predictability, and equality under law. Aristotle insisted that "the rule of law involved a government of laws, not men". More concretely, the rule of law has something to do with certain kinds of institutions and structures: well functioning, respected courts, judicial review, fair and adequate legal codes, and well-trained lawyers. To some extent, it may also be equated with respect for basic civil and political rights. See Jane Stromseth, David Whippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, 2006), p 56. Nevertheless, it may also be added that the concept of rule of law is amorphous and undertheorized. Perhaps for this reason, scholars think that groups as otherwise disparate as free market advocates, human rights activists, and national security hawks have all been eager to embrace the concept. See id. p 60 (note 8).

It is appropriate to note that the concept of the rule of law was developed, in the context of England, by Professor A.V. Dicey towards the end of the 19th century. For Dicey, the rule of law was the fundamental principle of the British constitution, and he gave it precision, by resolving it into three following distinct propositions: (i) "No man is punishable or can be lawfully made to suffer in body or goods, except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land"; (ii) "Not only is no

man above the law, but every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"; and (iii) "With us, the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence, of the rights of individuals as defined and enforced by the Courts".

Dicey's exposition received many criticisms. The chief critic was Sir W. Ivor Jennings who stressed that Dicey's analysis over-stressed the importance of individual rights, and that the assertion of the third proposition that the constitution depends on the law was unjustified.

Although the rule of law now may not exist in the form of Dicey's static doctrine, the term gives expression to a concept which is generally accepted by people irrespective of personal political views. In the domestic law context, the idea can be best defined in the following conditions: (i) 'The freedom of the individual must be restrained only under the authority of the law'; and (ii) 'Justice must be regarded as an end in itself.' In international context, however, the idea will be different and will need to be adapted. See, for some discussions, J. Harvey and L. Bather, *The British Constitution* (Macmillan Education, 4th edition, 1977), pp 424-435.

[171] In this context, the Oposa *et al* v. Factoran *et al* Case in the Philippines (G.R.N0. 101083, July 30, 1993) provides a contrasting but interesting feature, wherein the Court of that country, in order to protect the depletion of forest resources by corporate giants, agreed with the notion of intergenerational rights, and acknowledged the petitioner's personality to sue in behalf of the succeeding generations. The court also endorsed that based on the concept of intergenerational responsibility, in so far as the right to a balanced and healthful ecology is concerned, such a right was consistent with the *rhythm and harmony of nature.* See for detail, 69 *Philippines Law Journal* (1994), pp 181-207. Also, in India, in forbidding limestone mining operations in the Himalayan foothills, the Supreme Court of India took into account the interests of future generations in the unique legacy of the Himalayan ecosystem, requested them by past generations (*Rural Litigation and Entitlement Kendra v. State of U.P.*, Air 1988 Sc 2187). Similarly, the need to "defend and improve the human environment for present and future generations" was considered by the Court in ordering the closure of several tanneries, despite the unemployment resulting from such an order (*M.C. Mehta v. Union of India and Others,* Air 1988 Supreme Court 1037). It should be noted that intergenerational equity, which refers to the relationship of human being of the present generation to that of the future generations, imposes a duty on the present generation to use the natural environment not in a manner which degrades the environment. Human beings

have to hold the earth in trust for future generations. See Edith Brown Weiss, 'Our Rights and Obligations to Future Generations on the Environment', 84 *AJIL* (1990), p 198.

[172] For a detailed analysis of the water users' groups, including the arrays of legal instruments used, see generally, Salman M. A. Salman, *The Legal Framework for Water Users' Association: A Comparative Analysis,* World Bank Technical Paper No. 360, Washington (World Bank, 1997). Studies abound on the different mechanisms and techniques of implementing community driven development initiatives.

[173] See Manoj Kumar Sinha, 'Development at the Crossroads - Is right to development a human right?' in 42 *Indian JIL* (Oct-Dec. 2002), p 512. See also generally Declaration on the Right to Development (UNGA Res.41/128), December 4, 1986.

[174] Id. p 512 (citing Keba M'Baye).

[175] Id. p 512 (citing Karel Vasak).

[176] See Anghie, *supra* note 32, p 248.

[177] Id.

[178] See Cushman Coyle, *supra* note 70, p 78.

[179] According to scholars, the various justifications for the value of rights in development can be classified into three broad categories: normative, pragmatic, and ethical. The normative justification is that talking about rights put values and politics at the very heart of development practice. This approach works out a vision of *what ought to be*, providing a normative framework to orient development cooperation. In so doing, it brings an ethical and moral dimension to development assistance. By stipulating an internationally agreed set of norms, backed by international law, it provides a stronger basis for citizens to make claims on their states and for holding states to account for their duties to enhance the access of their citizens to the realization of their rights. See Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the 'Rights-based approach' to development into perspective', in 25 *Third World Quarterly* (2004), p 1416. Some scholars have also noted that the rights-based approach is basically an analysis of factors that lead to injustice, inequality, and powerlessness, which subject the poor people to further exploitation, discrimination, marginalization, and exclusion. See Shibesh Chandra Regmi, 'Social Exclusion, Poverty, and the Rights-Based Approach', in *The Inclusive State: Reflections on Reinventing Nepal* (Anand Aditya, Ed., SAP-Nepal, 2007), p 43.

[180] It may also be noted that Amartya Sen's contributions in ethics have challenged the exclusion of forms of basic deprivation and impoverishment (reflected in income, poverty, hunger, ill-health, starvation and other forms of premature mortality, and illiteracy) from the characterization of fundamental freedoms and human rights. See Vizard, *supra* note 81, p 96.

[181] The campaign led the World Bank to cancel its loan to India. See generally for detail, Dwivedi Ranjit, People's movements in environmental politics: A critical analysis of the *Narmada Bachao Andolan* in India, The Hague, Netherlands: Institute of Social Studies (1997); see also, for a different perspective on the Narmada river issue, Catherine Caufield, who noted that a year after the World Bank cancelled its loan to India, Lewis Preston acknowledged that "it was a public relations disaster" and that "the Bank had paid the highest price for not recognizing the importance of environment", Catherine Caufield, *Masters of Illusion. The World Bank and the Poverty of Nations* (New York: Henry Holt and Company, 1996), p 29.

[182] The campaign led the World Bank to withdraw its support for a multi million dollars power project in Nepal which would have been the largest project ever undertaken by the country. The decision came after the World Bank's Inspection Panel submitted the findings from an investigation into claims (lodged by NGOs, on behalf of the affected people) that the project could harm the lives and culture of indigenous people as well as the endangered flora and fauna in Nepal's Arun River Valley. For a detailed analysis of the problem, see *The World Bank and Nepal's Arun III Hydro Project: A Case of Anti-Social Development. Urgent Action Appeal,* (Prepared and compiled by Gopal Siwakoti Chintan and Adam Ma'anit, Kathmandu, INHURED International, June 1995).

[183] See, for instance, '17 Years After the Bhopal Tragedy, Union Carbide Continues to Evade Responsibility', Pesticide Action Network Updates Service (17th Anniversary of Bhopal Disaster December 5, 2001).

To recall, on December 3, 1984, a holding tank at the Union Carbide pesticide factory in Bhopal, India, overheated and burst, releasing methyl isocyanate (MIC), a highly toxic gas. MIC, hydrogen cyanide and at least 65 other gases spread across the city in a cloud, killing over 5,000 people within three days. Some drowned in their own bodily fluids; others were trampled to death trying to escape.

Even after almost two decades later, survivors suffer from neurological disorders, breathlessness, menstrual irregularities, early cataracts, persistent coughing, loss of appetite, recurrent fever, panic attacks, memory loss and depression. At least 20,000 people have died as a result of exposure to the gases. Approximately 15-20 more die each month.

A coalition of survivors' organizations and international supporters is demanding financial compensation for victims, prosecution of those whose negligence and aggressive cost-cutting (at the expense of safety regulations) led to the disaster, and a thorough environmental clean-up. However, to date, victims have received little or no assistance. In 1989, as part of a court settlement, Union Carbide paid US$470 million on the condition that it could not be held liable in any future criminal or civil proceedings. The Indian government was responsible for dispensing the money. As of June 2001, 90% of the death settlements have been for US$550, the minimum amount allowed by Indian federal regulations established in 1993. In many cases, this is far from enough to pay off initial debts for medical treatments and funeral services. An estimated US$240 million of the Union Carbide settlement remains in the Indian government's stewardship; accrued interest will not be passed along to survivors.

The then-CEO of Union Carbide (Anderson), was charged in India with culpable homicide, punishable by imprisonment for life. Indian courts issued a warrant for the CEO's arrest in the early nineties, and he received a summons from INTERPOL. Although the U.S. and India have made formal legal agreements ensuring the extradition of criminal suspects, neither government moved to force the CEO to stand trial. The Indian Attorney General later suggested that the charges against Anderson may be dropped.

Also, over the years, Union Carbide has refused to supply documents that reveal the composition of the gases, claiming that the company would be jeopardizing "trade secrets" by making such documents public. In February 2001, Union Carbide merged with Dow Chemical, and this policy of secrecy continued. When asked about Union Carbide's liability for the Bhopal disaster, Chairman Frank Popoff replied that Dow would not assume any responsibility for the disaster. See also, for aspects related to torts, Reuven S. Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization', in 42 *Columbia J. of Trans.* L, pp 13-14; see also Binda Preet Sahni, 'Future Trends for TNC Liability: The Application of Public International Law in Private Litigation', 43 *IJIL*, pp 247-251.

[184] See Arjun Sengupta, 'The Right to Development as a Human Right (2000)' [http://hsps. harvard. edu/ fxbcenter/fxbc_wp7 -pdf] (visited May 18 2006).

[185] Quoted in Id.

[186] See Caroline Moser and Andy Norton, *To Claim Our Rights, Livelihoods, Security, Human Rights and Sustainable Development* (ODI 2001), p 20.

[187] See also *supra* IV. 5.

[188] For an interesting discussion, see B. K. Nehru, 'Western Democracy and the Third World', *supra* note 76, pp 53-70 (and in particular the example contrasting China and India, p 64). It is interesting to note that Amartya Sen had challenged the idea of a core of so-called "Asian Values" that are in some ways opposed to civil and political rights

(often invoked, together with high growth rates in parts of East Asia during the 1980s and the 1990s, along with China's record of development and poverty reduction, as evidence of the positive impact of authoritarianism on economic growth). Actually, the view was also reflected at the World Conference on Human Rights in Vienna in 1993, where some countries suggested that democracy and civil and political rights can mitigate or hamper economic growth and development. But Amartya Sen challenged this thesis, countering that selective and anecdotal evidence from East Asia is balanced by several contrary evidences from other regions.

189 See Monshipouri, *supra* note 11, p 31.

190 Melvin I. Urofsky, 'Introduction: The Root Principles of Democracy', *Democracy Papers,* US Department of States, [http://usinfo. state. gov/ products/pubs/ democracy/homepage] (visited July 2, 2003).

191 Id.

192 See, for instance, Goodman, *supra* note 3, p 29. In this context, it may also be appropriate to note that the term 'democracy' in international rights parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its government. See Thomas Franck, 'Democracy as a Human Right', in *Human Rights: An Agenda for the Next Century* (Louis Henkin and John Hargrove, Eds, Washington, D.C., American Society of International Law, 1994), p 75.

193 See the Chapter by John Rawls on Civil Disobedience, in Joel Feinberg and Hyman Gross, *Philosophy of Law* (Wadsworth Publishing Co. 1991), p 105.

194 See Achilles Skodas, 'Hegemonic custom', in *United States Hegemony and the Foundations of International Law, supra* note 12, p 332. It is important to also add that the public's participation in law-making had been stressed as having significant concern already several decades ago, especially in connection with issues concerning the environment. The principle of public participation had been reiterated by a variety of international organizations and incorporated in a number of international instruments. See, for instance, Roda Mushkat, 'Public Participation in Environmental Law- Making: A Comment on the International Legal Framework and the Asia-Pacific Perspective', *Chinese JIL* (2002), p 185. Indeed as early as 1982, the World Charter for Nature (UNGA Res. 37/7, Annex, UN Doc A/RES/37/51, reprinted in 22 ILM (1982) stipulated the following: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their

environment, and shall have access to means of redress when their environment has suffered damage or degradation". See Principle 23.

The above principle was thereafter restated in several declarations, leading up to its most pronounced affirmation in the 1992 Rio Declaration on Environment and Development (UN Doc A/CONF.151/ 26, reprinted in 31 ILM, 1992, 874) which stated the following:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". See Principle 10.

195 See Bishwambher Pyakuryal, 'Political Economy. Peace, Democracy and Development', *The Himalayan Times* (July 18, 2006).

196 *The Common Law* (1881).

197 The King of England granted charters to individual proprietors and joint stock companies of entrepreneurs for the various colonies affording varying degrees of law-making authority, but all English colonists had law without current charters and colonial statutes. They had their ancient constitution, the largely unwritten law of England known as the 'English common law,' which prevented government from abusing the rights of Englishmen. Included in this common law was Magna Carta – the charter signed by King John in 1215, which guaranteed due process of law, the protection of property rights, and access to a jury. See generally, Gordon Morris Bakken, 'The Creation of Law in a Democratic Society', *Democracy Papers,* US Department of States, [http:// usinfo.state.gov/ products/ pubs/democracy/dm paper5.htm] (visited July 2, 2003). But in English speaking Africa, according to some, English law was applied without consideration of its suitability to local conditions. This is not because these systems were necessarily better than traditional African legal systems, but rather because there was a lock-in that occurred, a particular path that prevailed because of the earlier experience with a specific set of institutions. See Sandra Fullerton Joireman, 'Inherited Legal System and Effective Rule of Law: Africa and the Colonial Legacy', *J. of Modern African Studies* 39, 4 (2001), p 577.

198 See, for instance, Dr. Werner Menski, *'Lecture'* (22 Dec. 1999), in (2000) SCC (Jour) 9, in http://www.ebc-India.com/lawyer/articles/ 2000v3a2 (discussing briefly, the different situations of specific conflicts between

Hindu and Muslim Law in India, Bangladesh, Pakistan and the United Kingdom, particularly in the family law area); see also *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995*. Executive Summary of the Report prepared for the Asian Development Bank, by Katharina Pistor and Philip A Wellons 2005), pp 2-3. For an interesting discussion on the different approaches, see Antonio Cassese, 'The Concept of Law Upheld by Western, Socialist and Developing Countries', in *The Future of International Law in a Multicultural World* (Rene-Jean Dupuy, Ed., Workshop, The Hague, 17-19 November 1983, Hague Academy of International Law, Martinus Nijhoff, 1984), pp 317-329. It may be worthwhile to add that Berkowitz, Pistor, and Richard articulated that "countries that receive their fundamental legal order from another country have to come to grips with what was often a substantial mismatch between the preexisting and the imported order." See Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'The Transplant Effect', 51 *Am. J. Comp. L.* 163, 171 (2003). Valerie Knobelsdorf further added that "often, the imported system - particularly if imposed on an unwilling third party - tends to suffer from a misalignment between itself and the very situation it was intended to address." See Valerie Knobelsdorf, 'The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System: Dorsey and Whitney Student Writing Prize in Comparative and International Law', 44 *Colum. J. Transnat'l L.* 622, p 1.

199 Robert M. Cover, 'The Supreme Court, 1982 Term - Forward: Nomos and Narrative', 97 *Harvard Law Review* 4, 68 (1983).

200 See D. Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (June 1976), pp 1728-1731; also D. Kennedy, 'Legal Formality', 2 *Journal of Legal Studies* 351 (1973).

201 See Roscoe Pound, 'The Theory of Judicial Decision', 36 *Harvard Law Review* 641 (1923), p 658.

202 At a minimum, the law, as noted by a scholar, is for use as a tool, an instrument, a means for guiding action and giving effect to policies seeking common, or at least compatible, goals. See, for instance, William W. Bishop, Jr., 'The Role of International Law in a Peaceful World', in *Public International Law and the Future World Order*. Liber Amicorum in honor of A.J. Thomas, Jr. (Joseph Jude Norton, Ed.) (Rothman and Co., 1987), pp 1-4.

203 On how and why men abide by laws, see R. M. Maciver, *The Web of Government*, (Macmillan Publishing, 1965) (in particular, the chapter on the Firmament of Law, pp 47-61). Also, Robespierre's famous saying that the law must always offer, to the people, the purest model of justice and reason *(Il faut que la loi présente toujours au peuple le modèle le plus pur*

de la justice et de la raison) still remains perfectly valid and meaningful. See Robespierre, *Discours à l'Assemblée*, 30 May 1791.

204 It is important to stress that the history of the idea of the separation of powers is the history of class struggle. Within the history of the idea of liberal democracy, the history of the idea of the separation of powers is the history of class struggle in Britain in the 17th century and in America from 1760 to 1787. The separation of powers has been treated, traditionally and reverentially, as providing a shield against tyrannical concentration of political power, a guarantee of political freedom. Rather the idea should be seen as something very different, namely, the dialectical negation of the idea of the sovereignty of people. See, for instance, Allott, *supra* note 19, p 320.

205 The priority throughout the world has not been to systematically protecting individual rights. There are also systems where the focus is on the protection of community interests.

206 John Locke, *Second Treatise*, Ch. 4.

207 See generally, Greg Russell, 'Constitutionalism: America and Beyond', *Democracy Papers*. US Department of States, [http://usinfo.state.gov/products/pubs/ democracy/ dmpaper2. htm] (visited July 2, 2003).

208 See Robinson, *supra* note 131, p 1068.

209 See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), p 19.

210 This was more elegantly noted by Falk and Strauss. "If democracy is so appropriate in the nation-state setting, why should not democratic procedures and institutions be extended to the global setting?". See Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', in 36 *Stan. J. Int' L* (2000), p 191.

211 This is consistent with what Philip Jessup wrote in as early as 1948. "Until the world achieves some form of international government in which a collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled. See Philip Jessup, *A Modern Law of Nations* (1948), p 2 (cited in Bishop, Jr., *supra* note 201, pp 1-9). Also, the idea is not new. Jean Jacques Rousseau alluded to it already long ago. Georges Scelles, too, made some illustrative references in his writings. See, for instance, *Le Pacte des Nations et sa Liaison Avec le Traite de Paix* (Paris, Sirey 1919), pp 101-102 and pp 105-106; see also Muchkund Dubey, *supra* note 100, pp 238-239 (on democratization of the UN structure). Actually even fiction writers had favors for a world government. For instance, H. G. Wells, in his 1922 book *A Short History of the World* noted: "It is only now that we begin to realise

the scale and profundity of the changes in the conditions of human life that are in progress.... The scale of distances has been so altered, the physical power available has become so vast, that the separate sovereignty of existing states has become impossible."

212 *Pour aboutir a un texte de convention, soit bilatérale, soit multilatérale, donc pour légiférer en droit international, one ne peut pas compter, comme dans les parlements internationaux, sur le vote d'une majorité; tout finalement se négocie et il ne suffit pas de se fonder sur une saine doctrine juridique pour faire passer un texte, il faut convaincre que ce texte est le seul ou le meilleur dans l'intérêt général des Etats représentés.* See Andres Gros, 'Hommage au Professeur Paul Reuter', *Melanges Offerts a Paul Reuter. le Droit International: Unite et Diversite,* (Paris, Pedone, 1981), p 5.

213 In view of the recent position of some industrialized and developed countries vis-à-vis the recently established International Crime Tribunal, it is difficult to remain optimistic about the success of international jurisdictions. Nonetheless, the idea is quite defensible. A fully developed global community of law would encompass a plurality of rules of law achieved in different states and regions. No high court of one single country would hand down definitive global rules, but would coexist with an international court of justice issuing judgments that are within the realm of public international law. The supranational tribunals would continue to play a vital unifying and coordinating role, but their ultimate effectiveness will depend on their relationship with national government institutions exercising direct enforcement power. Overall, national courts would interact with one another and with supranational tribunals in ways that would accommodate national and international differences, but that would simultaneously acknowledge and reinforce a core of common value.

214 See Rene David and John. E. C. Brierley, *Major Legal Systems in the World Today* (Stevens, 1978), p 343.

215 The 14 principles of the Princeton Project essentially recommend clarity on the following: (1) fundamentals of universal jurisdiction; (2) serious crimes under international law; (3) reliance on universal jurisdiction in the absence of national jurisdiction; (4) obligation to support accountability; (5) immunities; (6) statutes of limitation; (7) amnesties; (8) resolution of competing national jurisdictions; (9) non bis in idem double jeopardy; (10) grounds for refusal of extradition; (11) adoption of national legislation; (12) inclusion of universal jurisdiction in future treaties; (13) strengthening accountability and universal jurisdiction; and (14) settlement of disputes. See, for detail, 'The Princeton Principles of Universal Jurisdiction. The Princeton Project', in *International Law. Classic and Contemporary Readings* (Charlotte Ku and Paul F. Diehl, Eds, 2004), pp 201-216.

216 However, in this context, it is also appropriate to note that some scholars like Allott see the European Union as a "troubling precedent for revolutionary social transformation at the global level, the level of all humanity". See Allott, *supra* note 4, p 182. Considered as 'blessed miracle and a reason for enormous celebration' by those familiar with the European history, Allott derides the European Union as the 'prussianisation of the European future, a symbol of the canker of defeatism which is now present in the public mind in Europe.' See id., p 283. Allott further considers it "as the greatest achievement of the new international ruling class." See id. p 397. In this context, it may also be noted that in parallel, the concept of global administrative law has also been developing, which more or less supplements the establishment of a global public law. See, for instance, Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *The European Journal of International Law* (No.1, 2006), pp 1-13. This Constitution could not garner the needed ratifications and therefore could not be issued and implemented. But, in order to fill in the vacuum created by that non-ratification, the same countries in 2007 adopted the Treaty of Lisbon, which incorporated by and large the provisions similar to the EU Constitution. Simply put, the Treaty signed by the Heads of State or Government of the 27 Member States in Lisbon on 13 December 2007 aims at providing the EU with modern institutions and optimized working methods to tackle both efficiently and effectively contemporary challenges, to address issues such as globalization, climatic and demographic changes, security and energy, and to reinforce democracy in the EU and its capacity to promote the interests of its citizens on a day-to-day basis.

217 See Falk and Strauss, *supra* note 210, p 193.

218 See generally, id., p 210.

219 See generally, id., p 211. For a detailed discussion, see also generally, B. K. Woodward, 'Global Civil Society and International Law in Global Governance: Some Contemporary Issues', in 8 *ICLR* (2006), pp 247-355.

220 See Sonu Trivedi, 'Politics of Regionalism in the World Economy', in *India Quarterly* (Vol. LXI, No. 2, April-June 2005), p 82.

221 See generally, for an interesting discussion, Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) (in particular, the conclusion, pp 261-271).

222 Indeed, to borrow from Fuller, 'law orders social life by subjecting human conduct to the governance of rules' (L.L. Fuller, *The Morality of Law* , Yale University Press, New Haven Press, 1969), p 96. But Fuller also notes "law is not just about order, it is about the establishment of

a just order." (L.L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1957-58) 71 *Harvard Law Review,* p 630. Indeed, law formal or informal, hard or soft, high or low, purports to set standards and to essentially provide the framework for the fair resolution of disputes.

[223] This conclusion derives from a superficial reading of James Hurst. See James Hurst, *Law and the Conditions of Freedom in the 19th Century United States* (Madison, The University of Wisconsin Press, 1956).

[224] Interestingly, the argument that law is the result of power, and that therefore, naturally big powers are more law-abiding than less powerful states also makes equal sense in the national context; the upper classes, being the big powers and the lower classes being the less powerful ones.

[225] See generally, for instance, Paul Bahaman, 'The Differing Realms of Law,' in *Law and Warfare* (Paul Bahaman, Ed., New York: The Natural History Press, 1967).

[226] Scholars have also noted that there is danger in exporting an instrumental view of law (universal applicability principle) to developing countries. When the state is under control of authoritarians, law can become an instrument of furthering authoritarian goals. See, for instance, Tureen Afroz, *supra* note 6.

[227] See *supra* note 3.

[228] Levi noted that some weaknesses of international law may be located in the law itself; for instance, its lack of precision, its incompleteness or the difficulty of finding it. But most of the weaknesses, according to Levi, are rooted in the international societal system. See Levi, *supra* note 60, p 166.

[229] Even those who have been critical of those who are 'anti-globalization', agree that there is need for a change of the system. For instance, they note: "We all know there is a crisis in global governance. ... If we are to reinvent embedded liberalism for this new age, and develop an efficient and legitimate regime for a very different set of economic conditions, we need a new vision for how to manage the world economy, new institutions, and a new politics." See the review of 'Governance in a Globalizing World' (edited by Joseph S. Nye, Jr., and John D. Donahue) in 96 *AJIL*, 748.

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APPENDICES

APPENDIX 1

Declaration on the Right to Development
(UNGA Res.41/128) December 4, 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security

and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfillment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favorable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals, who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

APPENDIX 2

Permanent Sovereignty over Natural Resources,
G.A. res. 1803 (XVII),
17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962)

The General Assembly,

Recalling its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952,

Bearing in mind its resolution 1314(XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries,

Bearing in mind its resolution I S I 5 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

Considering that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connection,

Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,

Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries,

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

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Pragya is an advocacy and action-based civil society organization set up to accelerate public welfare and enlightenment by promoting community awareness and mobilization in various fields through programs and projects related to people's enablement, entitlement, and empowerment. The objectives are to deepen and broaden the roots of democracy, social peace and harmony as well as human rights, nurture the rule of humanitarian law, accelerate the pace of development, and promote international goodwill and understanding.

Based on a survey of schools in 2003, Pragya published *Childpower and Civic Socialization of Children*, a basic orientation manual for the civic education of school-age children and has since been organizing debates, seminars, and symposia on peace (2003, 2006), role of youth (2007, 2008), and environment (2009), occasionally in collaboration with national and international agencies.